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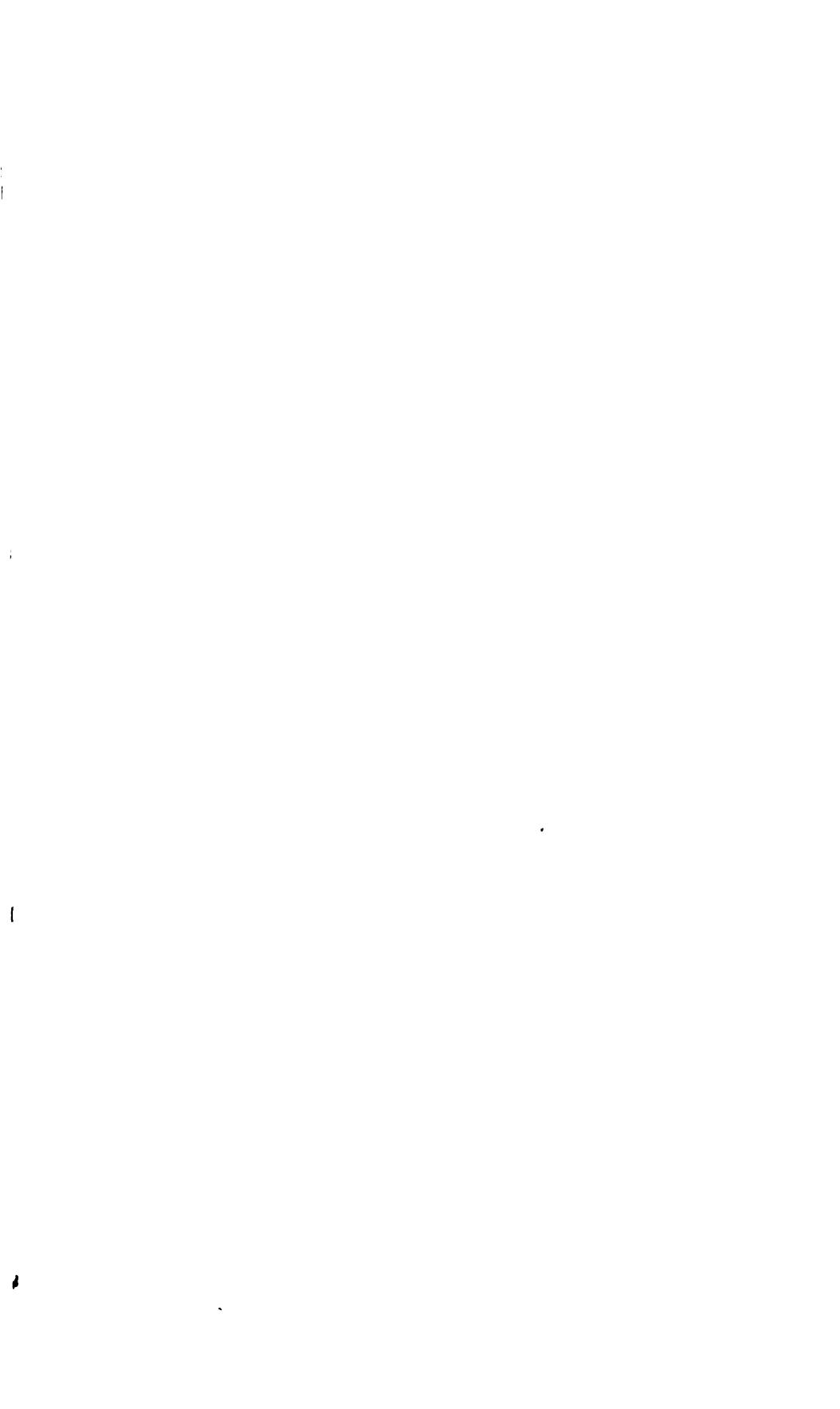
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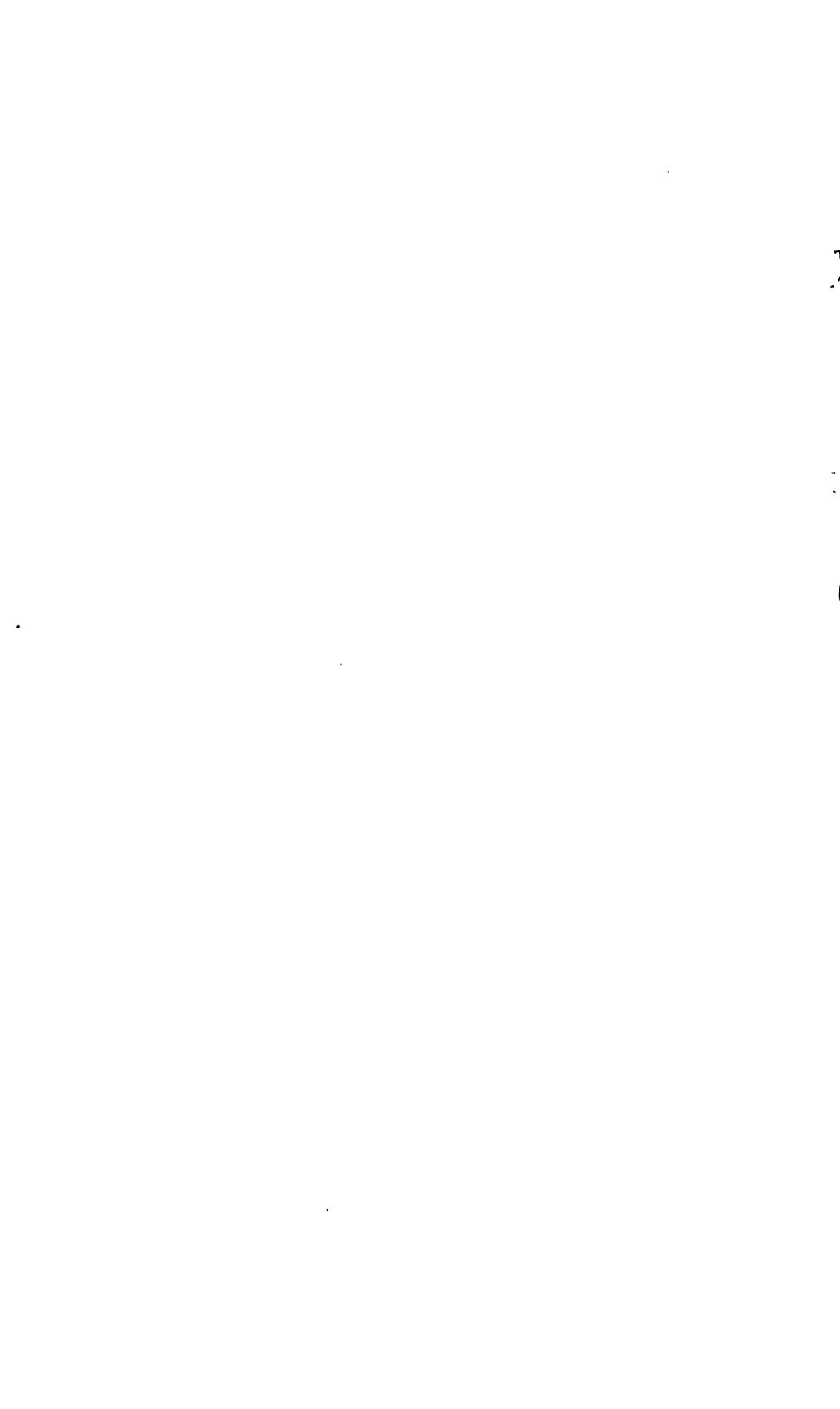
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LAW OF INSANITY

IN ITS APPLICATION

TO

THE CIVIL RIGHTS AND CAPACITIES

AND

CRIMINAL RESPONSIBILITY OF THE CITIZEN

BY

HENRY F. BUSWELL

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PREFACE.

In former times, the law was inclined to regard the human mind as an integer, and to hold that, if the subject were lunatic, he was incapable alike of performing valid civil acts, or of being affected with criminal responsibility. So it was held that, in order to excuse his unlawful acts, the subject must be totally deprived of his understanding and memory; and Sir Matthew Hale laid down the arbitrary rule that one who had, ordinarily, such understanding as a child of fourteen years has, might be guilty of treason or felony. But the law at the present day recognizes the principle that the capacity or responsibility of the subject in respect of any act, civil or criminal, is to be ascertained only by inquiring whether, by reason of the existence of mental disease, the doer of the act was unable reasonably to comprehend its nature, relations, effects, and legal consequences. The object of the present work, therefore, is to trace the Law of Insanity in its development into an harmonious system, and to consider, by the light of legal authority, the various possible acts, civil or criminal, of the insane person, as these are affected, in respect of their civil validity or their criminal quality, by such person's mental aberration, of whatever kind or however arising. The growing importance of the subject, as shown by the great number of judicial decisions involving its consideration, which have been reported during the last forty years, and the fact that the American cases bearing upon the subject have not hitherto been collected, will, it is believed, commend the book to the attention of the legal profession.

The work differs wholly, in its plan and purpose, from the works on the Medical Jurisprudence of Insanity which have been published from time to time. The principal purpose of these, as books of medical science, has been to treat of insanity as a disease merely, and to distinguish its different forms by a scientific nomenclature. Such works, however valuable to the medical profession, have not the weight of legal authorities, except in so far as the views expressed in them have been adopted and sustained in judicial rulings. the language of Mr. Justice Curtis, equally applicable upon the civil as upon the criminal issue of insanity, "The law is not a medical or a metaphysical science. Its search is after those practical rules which may be administered, without inhumanity, for the security of civil society, by protecting it from crime. And, therefore, it inquires, not into the peculiar constitution of mind of the accused, or what weaknesses, or even disorders, he was afflicted with, but solely whether he was capable of having, and did have, a criminal intent."

In considering the English cases upon the subject of insanity, and the lunacy practice and jurisdiction of the English Court of Chancery, the author has been aided by a study of the books of Stock, Collinson, and Shelford, and, especially, by the later works of Mr. Pope and Mr. Elmer.

It would be impossible to collate, within the limits of an ordinary treatise, the statutes of the different states upon the subject of insanity; and were such a collation possible, it would not be desirable, since the local law is always easily accessible to the American practitioner, and the existing statutes are being modified constantly by fresh legislative enactments. It is believed, however, that the American statute law will be found cited wherever such citation is of value as illustrating the text, or where the statute has been made the subject of judicial comment or interpretation. The English Lunacy Laws, as being often referred to, both in the present work and in judicial decisions, and not easily accessible to most American lawyers and students, are printed as an appendix to the volume.

H. F. B.

JANUARY, 1885.

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THE LAW OF INSANITY:

CHAPTER I.

LEGAL DEFINITIONS OF INSANITY.

SECTION I.

AS THE PRINCIPAL ISSUE.

- § 1. The common law recognized four specific forms of insanity; namely, lunacy, idiocy, accidental loss of understanding, and deprivation of understanding by the subject's voluntary act. And the generic words non compos mentis, of unsound mind, were regarded as words of determinate signification, importing a total deprivation of sense. Thus the Court of Chancery would not grant commissions de lunatico
- 1 "Lunatick is a technical word, coined in more ignorant times, as imagining these persons were affected by the moon; but discovered by philosophy and ingenious men that it is entirely owing to a defect in the organs of the body." Per Lord Hardwicke, in Barnsley, ex parte, 3 Atk. 168.
- ² Complete idiocy may be defined as "total fatuity from birth." Sir John Nichol, in Browning v. Reane, 2 Phill. 69.
- * Co. Lit. 248 a; Beverley's Case, 4 Co. 124. In the latter case Lord Coke defined the "four manners of non compos mentis" as follows: "1. Idiot or fool. 2. He who was of good and sound memory and by the visitation of God has lost it. 3. Lunatics, who have lucid intervals and sometimes is of good and sound memory and sometimes non compos mentis. 4. By his own act, as a drunkard.' The indications of, and characteristic differences between, the four kinds of dementia—called idiocy, delirium, lunacy, and dotage—were examined and considered in Colegate D. Owing's Case, 1 Bland's Ch. 370, 386.
- ⁴ It was said "non compos is the genus, and includes both idiocy and lunacy." Rochford v. Ely, Ridgway, 528.
- ⁵ Barnsley, ex parte, ubi supra; Co. Lit. 247 a; Beverley's Case, ubi supra.

inquirendo, unless it was made to appear that the subject was insane within the technical and somewhat artificial definitions prescribed by the law; and Lord Hardwicke said: "There are various degrees of weakness and strength of mind, from various causes. There may be a weakness of mind that may render a man incapable of governing himself, from violence of passion and from vice and extravagances, and yet not sufficient under the rule of law, and the constitutions of this country, to direct a commission." And, later, he refused to issue a commission in respect of a person of merely weak understanding and imbecile mind.

- § 2. The strict application of technical rules enforced by Lord Hardwicke being found to work injustice and inconvenience, the Court of Chancery, while still holding to the technical definitions of insanity laid down by the earlier authorities, came to hold that commissions de lunatico inquirendo were not confined to cases of strict insanity, but might be applied to cases of mental imbecility, arising from
 - ¹ Barnsley, ex parte, 3 Atk. 168.
- ² Lord Donegal's Case, 2 Ves. Sen. 407. In this case Lord Hardwicke said, "An idiot was such as was so ex nativitate, and therefore the court of common law held that finding a man idiot for so many years past was good; for finding him idiot was including that he was such from his nativity, and the rest was mere surplusage. Lunacy is a distemper occasioned either by disorders or accident; and to one of these two cases were commissions at first confined; but in some time this part of the prerogative was enlarged, and extended to one who is non compos mentis; but here it stopt, and this at least this court insists must be found to entitle any one to a commission." Lord Hardwicke's objections to issuing commissions de lunatico inquirendo, in cases where the party was not in a technical sense an idiot or lunatic, came to be met by the issue of commissions in the nature of those in lunacy in cases where there was such an imbecility of mind as to render the party incompetent to the management of his affairs. The proper return to such inquisitions did not embrace the technical words "lunatic" or "idiot" (see ch. iii. sec. iv., post), but was to the effect "that the party is of unsound mind; so that he is not sufficient for the government of himself," or "that he is incapable of managing his own affairs." See reporter's note to Lord Donegal's Case, ubi supra; and remarks of Lord Eldon in Gibson v. Jeyes, 6 Ves. 266, 272; and also Barker, in re, 2 Johns. Ch. 232. Under the definitions of insanity which obtain at the present day, the necessity for the issuing of such commissions no longer exists.

any cause, and so great as to render the subject incapable of managing the ordinary affairs of life. Thus Lord Eldon said: "I have reason to believe the court did not in Lord Hardwicke's time grant a commission of lunacy in cases in which it has since been granted. Of late the question has not been, whether the party is absolutely insane, but the court has thought itself authorized to issue the commission, provided it is made out, that the party is unable to act with any proper and provident management; liable to be robbed by any one; under that imbecility of mind, not strictly insanity, but as to the mischief calling for as much protection as actual insanity." In a leading case occurring in New York, where the party in respect of whom a commission in the nature of a writ de lunatico inquirendo had been awarded was of advanced age, and was found by the return to be "of unsound mind and mentally incapable of managing his affairs," Chancellor Kent said: "It is evident that . . . the subject of this inquisition is not a lunatic within the legal meaning of the He is not a person who sometimes has understanding and sometimes not. He is rather of that class of persons described by Lord Coke as non compos mentis, who have lost the memory and understanding by sickness, grief, or other accident. . . . The difficulty which has arisen with me is as to the extent of my jurisdiction. Mere imbecility of mind, not amounting to idiocy or lunacy, has not until very lately been considered in the English Court of Chancery as sufficient to interfere with the liberty of the subject over his person and property. I have not met with a case prior to our Revolution which has gone so far. Lord Hardwicke disclaimed any jurisdiction over the case of mere weakness of mind; yet it is certain that when a person becomes mentally disabled, from whatever cause the disability may arise, whether from sickness, vice, casualty, or old age, he is equally a fit and necessary object of guardianship and protection. . . .

¹ Ridgway v. Darwin, 8 Ves. 65. See also Monaghan, in re, 3 Jones & La T. 259; s. c. 9 Ir. Eq. Repts. 253; Kelly, in re, 6 Practice Repts. (Canada) 220; Gibson v. Jeyes, 6 Ves. 266; Cranmer, ex parte, 12 Ves. 445; Sherwood v. Sanderson, 19 Ves. 285; and remarks of Lord Eldon in Earl of Portsmouth's Case, cited in Shelf. Lun. 86.

I should imperfectly discharge my trust if I crippled the jurisdiction of this court by confining it to the strict commonlaw writ of lunacy." And the order appointing a committee was made. Under the modern practice of the English Court of Chancery and the construction given to the Lunacy Act, St. 8 & 9 Vict. c. 100, it is held that imbecility and loss of mental power to such an extent as to disqualify the subject from conducting the ordinary affairs of life, and whether arising from natural decay, disease, or other adventitious cause, and though unaccompanied by frenzy or delusion, constitute unsoundness of mind, amounting, in the view of the law, to insanity.2 And by the Lunacy Regulation Act of 1862, it is provided that in cases of commissions issuing in lunacy the inquiry shall be "whether or not the person who is the subject of the inquiry is at the time of such inquiry of unsound mind, and incapable of managing himself or his affairs." 8

SECTION II.

AS A COLLATERAL ISSUE.

- § 3. The earlier definitions of the different kinds of insanity, and the construction of the words non compos mentis to imply
- Barker, in re, 2 Johns. Ch. 232 (1816); and see Mason, in re, 1 Barb. 436; Lackey v. Lackey, 8 B. Mon. 107; Nailor v. Nailor, 4 Dana, 339. In the latter case it was held that the jurisdiction of chancery over insane persons was not restricted to cases of idiocy and lunacy, strictly so called, but it would extend to all cases of such imbecility as renders its subject incapable of conducting his affairs with common prudence and leaves him liable to become the victim of his own folly or the fraud of others. But it was added that the jurisdiction should be assumed only when it appears clearly that the subject is non compos mentis.
- Regina v. Shaw, L. R. 1 Cr. C. R. 145; s. c. 11 Cox C. C. 109. In this case the mind of the person pronounced insane was quite imbecile from natural causes, aggravated by intemperance, and he allowed himself to be kept in a state of revolting filthiness; but it did not appear that he labored under any delusion or mental aberration, nor was he subject to fits of frenzy or violence. See also Regina v. Bishop, 14 Cox C. C. 404.
- * Act 25 & 26 Vict. c. 86, § 3. This act, together with the other acts of Parliament touching the matter of lunacy, now in force, are printed in the Appendix to this volume.

a total deprivation of sense, have been greatly modified and extended by the English courts in cases where the question of insanity has arisen as a collateral issue. So early as 1805, a charge in a bill in equity to the effect that A. " was of weak and feeble understanding, approaching almost to idiocy," was considered to be an allegation sufficiently precise, no demur- . rer being filed, to put in issue the question of the sanity of A.'s memory; and it being proved that he was "incapable of managing himself or his affairs," he was held to be within the saving clause of St. 7 Geo. II. c. 14, § 8.1 Later, in a suit brought in the Ecclesiastical Court to nullify a marriage on the ground of the insanity of one of the parties at the time of the contract, and consequent want of consent, Sir John Nichol held it to be immaterial whether the want of consent arose from idiocy or lunacy, or from both combined, and considered it unnecessary to discuss the question of what is idiocy or what is lunacy.2 And in a leading case, also occurring in the Ecclesiastical Court, he said: "It may safely be assumed ... that madness subsists in every variety of shape and degree. It subsists in the maniac chained to his floor, . . . in the patient afflicted with mental aberration on certain subjects, or on a certain subject only; and in respect of such, even, never betraying itself in violence or outrage. The affliction is the same in both cases, in species; the difference is only in degree."8

§ 4. In a leading case originally commenced in the Court of King's Bench for Ireland, the issue was whether a certain paper purporting to have been executed by J. S. B. was good as constituting a valid deed, it being contended by the defendant that, at its date, J. S. B. was mentally incapable of executing such a deed. Witnesses on the part of the plaintiff deposed that J. S. B., in their opinion, at the time of the execution of the deed, was not competent to execute such deed, and testified to acts and conduct of his evincing mental

¹ Carew v. Johnston, 2 Sch. & Lef. 280. But it was said that the allegation would not have been sufficiently precise if it had been contained in a plea, or in a bill demurred to.

² Browning v. Reane, 2 Phill. 69.

^{*} Dew v. Clark, 3 Add. Ecc. 79, 87.

incapacity; but deposed that he certainly was not an idiot. It was admitted that he was not a lunatic. The judge, in charging the jury, told them that the question for them to try was whether J. S. B. was a person of sound mind or not, and that to constitute such unsoundness of mind as should avoid a deed at law, the person executing such deed must be incapable of understanding and acting in the ordinary affairs of life; that it was not necessary that he should be without a glimmering of reason, but that it was sufficient if he was incapable of understanding his own ordinary concerns; that as one test of such incapacity the jury were at liberty (1) to consider whether he was capable of understanding his own ordinary concerns; and (2) whether he was capable of understanding what he did by executing the deed in question, when its general purport was fully explained to him. On the part of the defendant a bill of exceptions was taken to this charge, the defendant's counsel insisting that, in order to avoid the deed at law, the unsoundness of mind of J. S. B. must amount to that degree of unsoundness which constituted idiocy according to the strict legal definition of an idiot. Upon the argument of the bill of exceptions it was held that the charge of the judge was right, and that a man by putting his seal to an instrument does not make it his deed, if, at the time of so doing, he was so weak as to be incapable of understanding it if explained to him, although he might not fall within the strict legal definition of an idiot.1

§ 5. The case was argued before the Court of Exchequer Chamber for Ireland, and thereafter carried, on writ of error, to the House of Lords, where it was elaborately argued by Sir Edward Sugden on behalf of the plaintiff in error. He contended that the judgment below was erroneous, since the law recognized but four kinds of insanity; i.e., lunacy, idiocy, accidental loss and wilful deprivation of understanding,—and it was admitted that the incapacity of J. S. B. did not fall within either one of these classes. He said: "The judgment in this case seems to have proceeded on the principles applied in commissions of lunacy and in courts of equity, which is a different species of jurisdiction; and even in those cases the

¹ Mannin v. Ball, Smith & Batty, 183.

jury must find that the person is of unsound mind, —it is not sufficient to find that he is of weak judgment and understanding, and incapable to manage his affairs. . . . Weakness of understanding . . . is only one among other ingredients which in equity constitute fraud. To direct a jury to consider whether a man is capable of understanding a deed is a dangerous practice, and contrary to the practice on commissions of lunacy. . . . In the case of wills, the question turns upon general capacity, and wills have been found void when the testator would not have been found insane if living. The question as to deeds stands on different principles. That is a question between parties dealing for consideration, whereas in wills it is between representatives and voluntary donees." But in pronouncing the judgment of the House of Lords, Lord Tenterden said: "It was argued by counsel that the party was not a lunatic; that is, that he was not at one time of sound mind and at another unsound, but that whatever the state of mind might be, that it was not temporary but permanent. The judge told the jury that the question was whether the party was of sound mind or not; and that mode of stating the question was quite correct. He then proceeded to give a definition, 'that to constitute such unsoundness as should avoid a deed at law, the party executing such deed must be incapable of understanding and acting in the ordinary affairs of life.' In that, perhaps, he went too far. He then directed the jury that 'it was not necessary he should be without any glimmering of reason, and, as one test of such incapacity, they were at liberty to consider whether he was capable of understanding what he did by executing the deed in question, when its general purport was fully explained to him.'... The counsel for the defendant then required the judge to tell the jury, that, in order to avoid the deed at law, the unsoundness of mind must amount to idiocy, according to the strict legal definition of an idiot; and this being refused, the bill of exceptions was tendered and sealed. . . . As to the strict legal definition, I find in an old book on this subject, that if a person is capable of learning the alphabet, he is not within the legal definition of idiocy; yet it is impossible to hold that persons no further qualified are capable of

executing a deed. The question at law is, whether, in substance, there is such capacity of execution; and in effect the judge in this case so put the question to the jury, when he told them that the question was whether the party was of sound mind or not, and directed them to consider whether he was capable of understanding the deed when explained."

Lord Plunket concurred, and the judgment below was affirmed.

SECTION III.

AS ESTABLISHED IN THE UNITED STATES.

§ 6. A similar modification and extension of the definitions of legal insanity and the term non compos mentis to that which has been traced in the English law is to be found in the American decisions. Thus in Pennsylvania, in an early case on this subject, the return of an inquisition that the party, "by reason of old age and long-continued sickness, had become so far deprived of reason and understanding as to be wholly unfit to manage his estate," was held not a sufficient finding that the party was non compos mentis within the constitution and laws of the commonwealth.² The doctrine of this case was somewhat modified a few years later, the court holding that, upon a traverse of an inquisition, the question was whether the mind was deranged to such an extent as to disqualify the traverser from so conducting himself as not to endanger his personal safety or that of others, and from managing and properly disposing his own affairs and discharging his relative duties.8

¹ Ball v. Mannin, 3 Bli. N. s. 1; s. c. 1 Dow & C. 381.

² Beaumont, in re, 1 Whart. 52 (1835). In this case the court entered into an elaborate discussion of the term non compos mentis, and construed it to imply a total deprivation of sense, thus following the case of Barnsley, ex parte, 8 Atk. 168. See § 1, ante.

⁸ M'Elroy's Case, 6 W. & S. 451 (1843). But the court, in this case, continued to concur in Lord Hardwicke's definition of the words non compos mentis, to which it considered the word "lunatic" tantamount in modern jurisprudence, saying: "Until within a few years past the most correct and comprehensive term... to include all kinds of mental

In a still more recent case, the court declared that the state of unsoundness of mind which incapacitates one from taking care of his person or business was the condition prescribed by an act of assembly, providing for the holding of commissions of lunacy; although mere weakness of mind, not an abnormal condition, and short of idiocy, was not a ground for a commission. And the court disapproved a charge to the jury below, on the trial of the traverse, that "until the mind is entirely blotted out persons must be left to the management of their own affairs;" and that "as long as there is a spark of intelligence left the law does not permit their liberty to manage themselves or their property to be infringed." And in another case it is said, "The test lies in the word 'power.' Has the defendant in a criminal case the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong? In other cases, has the defendant, in addition to the capacities mentioned, the power to govern his mind, his body, and his estate?"2 In Kentucky the court formerly held that the words "of unsound mind" do not, when used in a legal sense, mean imbecility of mind merely, but are synonymous with non compos mentis, and import necessarily "a total deprivation of reason, comprehending idiocy, lunacy, and adventitious madness, either temporary or permanent." 3 And

unsoundness was the phrase non compos mentis. This phrase, Littleton says, is most sure and legal, and includes all others, whether amens, demens, furiosus, lunaticus, fatuus, or stultus... The word 'lunatic,' which is now used as a generic term, was not anciently used as such.... But modern legislation has substituted it for non compos mentis."

- commonwealth v. Schneider, 59 Penn. St. 328 (1868). The court say: "The judge fell into error by following Beaumont's Case, 1 Whart. 52, which seems to have rested on Barnsley's Case, 3 Atk. 168, which Lord Eldon refused to follow in Ridgway v. Darwin, 8 Ves. 65. Mc-Elroy's Case [ubi supra] must be regarded as a modification of the rule in Beaumont's Case, which rested rather on a question of the disease of the mind than on its capacity to act rationally. We have seen that the latter is the practical test, while the former must often be theoretical and speculative.
 - ² Commonwealth v. Haskell, 2 Brews. 491 (1869).
- Jenkins v. Jenkins, 2 Dana, 102 (1834). But see, contra, Lackey v. Lackey, 8 B. Mon. 107; Nailor v. Nailor, 4 Dana, 839, as cited ante, § 2, note.

similar expressions were used by the court in South Carolina.¹ So in New Jersey it was held that, in order to justify a jury in finding a man a lunatic, they must be satisfied that he suffers from a total deprivation or suspension of the ordinary powers of the mind.² In a later case it was held that they were to inquire whether the party is of unsound mind or not, although they may not find him a lunatic in the ordinary sense of the term.³

- § 7. But the view of the law stated by the English courts in the cases of Mannin v. Ball and Ball v. Mannin is sustained by the weight of American authority. And the conclusions arrived at in those cases were stated substantially at about the same time by the Supreme Court in Connecticut. The issue being upon the validity of a deed executed by one alleged to have been insane, the court held the true test of mental sanity to be, not whether the person had sufficient understanding to know what he was doing, but whether he had the right use of his reason in reference to the act done. giving judgment, Hosmer, C. J., said: "If a man be legally compos mentis, be he wise or unwise, he is the disposer of his property, and his will stands as a reason for his actions. . . . But it would demand great consideration before it should be affirmed that the mere knowledge of the act a person is doing, which, for aught I can discern, may be asserted of an idiot,
 - ¹ Foster v. Means, Speers, 569 (1844).
 - ² Vanauken, in re, 2 Stockt. 186 (1854).
- *Conover, in re, 1 Stew. 330 (1877). The case appears to have been decided upon the ground that the words "of unsound mind" are legal and technical words, and more properly used in pleading than the word "lunatic," or lunaticus. See Shelf Lun. 109; Dennis v. Dennis, 2 Saund. 352. It is to be observed that the technical definitions insisted on in the New Jersey court were applied in cases where the direct issue was insanity vel non. But on an issue of testamentary capacity, the court in that State, in 1819, said: "The terms 'sound and disposing mind and memory'... stand opposed not only to idiocy and lunacy, but to all derangement of mind occasioned by melancholy, grief, sorrow, misfortune, sickness, and disease; that it is true that every discomposure of the mind from these causes will not render one incapable of making a will, —it must be such a discomposure, such a derangement, as deprives him of the rational faculty common to man." Den v. Johnson, 2 South. 454. See Sloan v. Maxwell, 2 Gr. Ch. 563.

would constitute him compos mentis. I think he must know something of the nature and consequences of the act. . . . It is a fact universally known that a person may be non compos mentis, and yet possess great vigor of intellect [and] unusual power of reasoning. . . . His mind is unsound by reason of the delusive sources of thought; all his deductions within the scope of his malady being founded on the assumption of matters as realities without any foundation, or so distorted and disfigured by fancy as in effect to amount to the same thing.1 In New Hampshire the court, in an elaborate opinion by Bell, C. J., have refused to adopt the view laid down in Beverley's Case, that the words non compos mentis import a total deprivation of sense, and that to avoid a deed this condition of mind in the grantor must be shown, and held that every person is to be deemed of unsound mind who has lost his memory and understanding by old age, sickness, or other accident, so as to render him incapable of transacting his business and managing his property.2 And in Alabama the court say: "We do not subscribe to the proposition that the term non compos mentis necessarily denotes a total deprivation or destruction of the intellectual powers. It denotes unsoundness of mind; not mere mental weakness, but a diseased or unhealthy mind."8

- ¹ Hale v. Hills, 8 Conn. 39 (1830). The court endeavor to reconcile the ancient definitions of legal insanity given by Coke and Hale, in conformity with the views expressed in their opinion.
 - ² Dennett v. Dennett, 44 N H. 531.
- **Carmichael, in re, 36 Ala. 514. See also Rawdon v. Rawdon, 28 Ala. 565; Hovey v. Chase, 52 Maine, 304; Blanchard v. Nestle, 3 Denio, 47; Stanton v. Wetherwax, 16 Barb. 259; Rogers, in re, 9 Abb. N. C. 141; Frazer v. Frazer, 2 Del. Ch. 260; Colegate D. Owing's Case, 1 Bland's Ch. 370; Greenwade v. Greenwade, 43 Md. 313; Fentress v. Fentress, 7 Heisk. 428; Kenworthy v. Williams, 5 Ind. 875; Willett v. Porter, 42 Ind. 250; Ludwick v. The Commonwealth, 18 Penn. St. 172. In Massachusetts it is provided by statute that the words "insane person" and "lunatic" shall include every idiot, non compos, lunatic, insane, and distracted person. Pub. Sts. Mass. c. 3, § 1, cl. 10. In the New York statute regulating the Utica Lunatic Asylum (Rev. Sts. 7th ed vol. iii. c. 20, tit. 8, § 37) it is provided that "the terms 'lunacy,' 'lunatic,' and 'insane,' as construed for the purposes of the act, shall include every species of insanity, and extend to every deranged person and all [sic] unsound mind other than idiots."

SECTION IV.

MERE WEAKNESS NOT INSANITY.

- § 8. But although imbecility of mind may constitute insanity in the eye of the law, mental weakness may exist and the subject remain legally sane; and, being so, he will be criminally responsible for unlawful acts done by him, and capable of entering into valid civil contracts.1 even although a man have not, in the judgment of other men, sufficient intelligence and understanding to manage his affairs in a proper and prudent manner, yet he may not be, legally speaking, non compos mentis.2 In cases of insanity proper, as distinguished from idiocy, whether this has, according to the old definitions, existed ex nativitate, or whether it be the result of a general decay of the reasoning powers arising from adventitious causes, the test of insanity, as distinguished from mere weakness, is held to be the existence of delusion, or a belief in the existence of facts which have no existence.8 This distinction between mere weakness and insanity will be found more fully considered elsewhere in its application to the possible civil and criminal acts of alleged insane persons.4
- § 9. The law anciently presumed that all persons born deaf and dumb were idiots; but, later, Lord Hardwicke held that this presumption, if it still existed, might be rebutted, and accordingly, upon such a person arriving at her majority and applying for the possession of her chattel estate, he ordered it delivered to her, having first put questions to her in writing, to which questions she gave sensible answers, also in writing. In New York the possible exist-
- ¹ Dennett v. Dennett, 44 N. H. 531; Hale v. Hills, 8 Conn. 39; Carmichael, in re, 36 Ala. 514; Somers v. Pumphrey, 24 Ind. 281; Greenwade v. Greenwade, 43 Md 313.
 - ² Hovey v. Chase, 52 Maine, 304.
 - * See §§ 13, 14, post.
 - 4 See chapters ix., xiii., post.
 - ⁵ Elyot's Case, Carter, 53.
 - 6 Dickinson v. Blissett, 1 Dickens, 268.

ence of such a presumption, until rebutted, was recognized by Chancellor Kent; 1 but it is apprehended that it no longer exists as a presumption of law.2 Nor can it be said to be a rule of law that merely because a man is a drunkard therefore he is of unsound mind.8

SECTION V.

MERE MORAL PERVERSION NOT INSANITY.

- § 10. It is stated elsewhere that mere beliefs, opinions, or prejudices, unless these necessarily involve the existence, in the mind of their subject, of some delusion as to fact, are not evidence of insanity. And the same rule is applied to opinions in relation to the moral quality of acts; that is to say, no perversion of the moral nature or mere disorder of the moral affections and propensities, unless accompanied by such delusion as indicates the subversion of the will and reason, is to be regarded as constituting insanity in law. Thus moral insanity, or the perversity of the moral feelings, is of itself insufficient to invalidate the civil act, or excuse the criminal act, of its subject. A contrary doctrine has been laid down in a few cases, but the great weight of authority is in favor of the proposition stated. In a leading English case upon the subject, Sir Hubert Jenner Fust said that he was not aware of any case decided in a court of law where moral perversion of the feelings alone, unaccompanied by delusion, had been held ground for invalidating or nullifying the acts of the person affected.4
 - ¹ Brower v. Fisher, 4 Johns. Ch. 441.
- ² See Barnett v. Barnett, 1 Jones Eq. 221; Christmas v. Mitchell, 3 Ired. Eq. 535; Commonwealth v. Hill, 14 Mass. 207; and remarks of Chancellor Kent in Brower v. Fisher, ubi supra.
 - ⁸ Johnson's Estate, 57 Cal. 529. See ch. ix. sec. iv.; ch. xiii. sec. iv.
- 4 Frere v. Peacock, 1 Rob. Ecc. 442 (1846). In this case the court refer to the doctrine of "moral insanity" as one "which none of the eminent writers upholding ventures to say has yet found its way into our courts of law. Indeed, Dr. Prichard expressly complains of the slowness with which this new species of insanity has been recognized in this country; and his opinion, as well as that of Dr. Ray and others, is rather to show

§ 11. The doctrine above stated applies as well to cases in which moral perversity is alleged as an excuse for crime, as to those where the validity of the subject's civil acts is in issue, since the law does not recognize any moral power compelling its subject to do what is wrong; and the insanity which takes away the criminal quality of the act must amount to mental disease of such character as to prevent its subject from understanding the nature and quality of the act he is doing.1 In other words, applying a rule hereafter stated, the delusions which indicate such insanity as will relieve its subject from criminal responsibility must be such as relate to facts and objects, not mere wrong moral notions or impressions; and the aberration must be mental, not moral merely.² The logical result of the doctrine which would make moral perversity the legal equivalent of insanity has been well stated as follows: "I cannot yield to the doctrine which has been suggested, founded upon what is called moral insanity. Every man, however learned and intellectual, who, regardless of the laws of God and man, is guilty of murder, or other high and disgraceful crimes, is most emphatically morally insane. Such doctrine would lead to the most pernicious consequences, and it would very soon come to be a question for the jury, whether the enormity of the act was not in itself sufficient evidence of such insanity, and then the more horrible the act the greater would be the evidence of such insanity." 8

what, according to their view, the law should be, as distinguished from that which it is; for they admit the *legal* test to be the existence or non-existence of delusion." The doctrine of Frere v. Peacock was quoted with approval in Boardman v. Woodman, 47 N. H. 120; Mullins v. Cottrell, 41 Miss. 291. And see Forman's Will, 54 Barb. 274; Mayo v. Jones, 78 N. C. 402.

¹ State v. Brandon, 8 Jones (N.C.), 463; Choice v. The State, 31 Ga 424; Humphreys v. The State, 45 Ga. 190; Boswell v. The State, 63 Ala. 307; Flanagan v. The People, 52 N. Y. 467. In the latter case it is said that the law does not recognize a form of insanity in which the capacity of distinguishing between right and wrong exists without the power of choosing between them. See, upon the general subject, ch. xiii. sec. iii., (b), post, and cases cited.

² Regina v. Burton, 3 F. & F. 772.

^{*} Hornblower, C. J., in State v. Spencer, 1 Zab. 196 (1846). It is to

§ 12. Moral insanity, as already defined, implies merely a disorder or perversion of the moral faculties or a confusion of the ethical distinctions between right and wrong. If the disorder has proceeded so far as to destroy the reasoning faculties of the mind, or, possibly, the volition of the subject,2 intellectual or legal insanity has supervened, and the subject may or may not be competent to perform civil acts or be criminally responsible for unlawful acts done by him.³ In several cases this distinction between moral and intellectual insanity has been lost sight of, and the result has been an apparent contradiction in terms. Thus it has been said that moral insanity is a disorder of the feelings, and may or may not impair the intellect.4 But moral insanity, so soon as it subverts or controls the intellectual powers of its subject, becomes merged in that intellectual insanity which alone the law recognizes. In a leading criminal case occurring in Pennsylvania, Gibson, C. J., said: "There is a moral or homicidal insanity, consisting of an irresistible inclination to kill. . . . The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance. . . . If juries were to allow it as a general motive, operating in cases of this character, its recognition would destroy social order as well as personal safety." 5 But if the possible existence of "homicidal mania" is recognized in the law, which question will be found discussed hereafter,6 it exists not as a phase of moral insanity, but as a kind of intellectual insanity which overpowers the volition and, consequently, the reason of its subject; for the doctrine that

be noted that the doctrine indicated by Judge Hornblower as being the logical result of the recognition of moral insanity in the law has since been clearly promulgated by an eminent writer on medical jurisprudence. Ray, Contributions to Mental Pathology, 115.

- ¹ See § 10, ante.
- ² See ch. xiii., post.
- See ch. ix. sec. i., post.
- 4 Forman's Will, 54 Barb. 274.
- ⁵ Commonwealth v. Mosler, 4 Penn. St. 266.
- See ch. xiii. sec. iii., (c), post.

moral insanity, consisting of an irresistible impulse, can coexist with mental sanity is said to find no support either in psychology or in law.¹

SECTION VL

DELUSIONS.

(a.) Defined. Generally the Test of Insanity.

- § 13. The English and American courts, in a long series of decisions, established the rule that the true criterion of the presence or absence of insanity in any case was the presence or absence of delusion in the mind of the subject.² And this
- 1 Boswell v. The State, 63 Ala. 307; and see Wharton, Hom. § 574. In St. Louis Mut. Life Ins. Co. v. Graves, 6 Bush, 268, an instruction was given in the court below to the effect that although the jury might be satisfied that G. committed suicide, and that when he did the act his intellect was unimpaired, and that he knew the act was forbidden both by moral and human law, yet if they believed that, at the instant of the commission of the act, his will was subordinated by an uncontrollable passion or emotion impelling him to the act, it was an act of moral insanity. The contradiction in terms criticised in the text appears clearly in this instruction. The instruction was disapproved, but the court were equally divided upon the question whether the suicide proved in the case was an "act of moral insanity."

In Andersen v. The State, 43 Conn. 515, the court, speaking of moral insanity, say: "It is true that the courts have been slow to recognize this form of insanity as an excuse for crime; nevertheless that it exists is well understood, and that in some cases it is clearly defined by medical and scientific men cannot be denied." And the court, while not deciding the point whether moral insanity may be an excuse for crime, hold that its existence may, under certain circumstances, operate to reduce the degree of the crime. But it is to be observed that it does not clearly appear in this case whether the court intend by moral insanity such an aberration as affects the moral faculties merely, and that the facts showed that the plaintiff in error was affected with specific insane delusions. The proposition that mere moral perversity may operate to reduce the degree of a crime, while not excusing it, does not appear to be supported by authority elsewhere.

² Dew v. Clark, 3 Add. Ecc. 79; Wheeler v. Alderson, 8 Hagg. Ecc. 574; M'Elroy's Case, 6 W. & S. 451; American Seamen's Friend Society v. Hopper, 33 N. Y. 619; Duffield v. Morris, 2 Harr. 375; Sutton v. Sadler, 5 Harr. 459; Frere v. Peacock, 1 Rob. Ecc. 442. The existence of

test is to be accepted as the correct one, except in a class of cases hereafter referred to, which formerly were not recognized as falling within the ordinary definitions of lunacy or unsoundness of mind. Delusion, in the language of Sir John Nichol, exists "Wherever the patient conceives something extravagant . . . to exist which has . . . no existence whatever, . . . and . . . he is incapable of being . . . permanently reasoned out of that conception." And he continues: "The absence or presence of delusion . . . forms, in my judgment, . . . the only test . . . of absent or present insanity. I look upon delusion, in this sense of it, and insanity, to be almost, if not altogether, convertible terms, so that a patient, under a delusion, so understood, on any subject, or subjects, in any degree, is, for that reason, essentially mad, or insane, on such subject, or subjects, in that degree." 2 And delusion is often briefly defined as exhibited in the belief of facts which no rational person would have believed, and in the inability to be reasoned out of such belief; 4 or, in other words, in the belief of things as realities which exist only in the mind of the

a delusion is the symptom or result of a diseased mind, and so long as the delusion continues, whether exhibiting itself more or less distinctly, there must still be unsoundness. So the most satisfactory proof of recovery from an unsound state of mind is the conviction of the non-reality of the delusions which arose from the disease. And it seems that a finding of lunacy in any case, by a competent tribunal, will not be superseded when any declared illusion continues to exist. Dyce Sombre, in re, 1 Mac. & G. 116; s. c. 1 H. & T. 285.

¹ See § 16, post.

Dew v. Clark, 8 Add. Ecc. 79. Where, upon the issue of testamentary capacity, it was contended that the testator, although a man of large property, believed that he was without means to purchase the necessaries of life, and the court was asked to rule, as matter of law, that the existence of such a belief would conclusively indicate insanity, the ruling was refused, the court saying that such a delusion, though evidence of insanity, was not conclusive. The refusal was supported on the ground that it was not proper to select a particular instance of delusion and make it a legal test of the existence of insanity. Gardner v. Lamback, 47 Ga. 183.

^{*} McElroy's Case, 6 W. & S. 451; American Seamen's Friend Soc. v. Hopper, 33 N. Y. 619; Forman's Will, 54 Barb. 274.

⁴ Stanton v. Wetherwax, 16 Barb. 259; Mullins v. Cottrell, 41 Miss. 291. The essence of delusion is that it has no basis in reason, and cannot be dispelled thereby. Merrill v. Rolston, 5 Redf. 220.

patient, the frame of mind which indicates the patient's inability to be reasoned out of such erroneous beliefs constituting an unsound frame of mind. Again, insane delusions may be said, generally, to consist either (1) in the belief in things impossible, as in the reversal of the laws of nature, or (2) in things in themselves possible, but so improbable under existing circumstances that no sound mind would give them credit, as in the belief in the occurrence of amazing coincidences of like or related events. This latter class may be taken to include the carrying to an unreasonable extent impressions and ideas not in their nature irrational.²

§ 14. But a mere belief, however absurd it may appear to the minds of other men, will not, unless it amount to a perversion of reason, be considered in law as an insane delusion. Thus a belief on a question which is entirely within the domain of opinion or faith, and not of actual knowledge, as in regard to the existence or conditions of a future state, cannot, however seemingly preposterous, be considered evidence of the believer's insanity, since such a belief can only be refuted by advancing some other belief which itself can have no foundation in positive knowledge. In other words, there is in such matters of opinion, in a logical sense, no major premise of knowledge.8 The same rule applies, generally, to mere opinions, prejudices, or antipathies entertained in respect of the persons, feelings, or intentions of other men,4 although a prejudice against another may be so violent and unreasonable as to be taken, in connection with other evidence of insanity, to constitute an insane antipathy.5 But, generally, it appears

¹ Waring v. Waring, 6 Moo. P. C. C. 341.

² See opinion by Dr. Lushington, in Prinsep v. Dyce Sombre, 10 Moo. P. C. C. 232.

See Bonard's Will, 16 Abb. Pr. N. s. 128. In this case a belief that the souls of men after death passed into animals was held not inconsistent with sanity.

⁴ American Seamen's Friend Soc. v. Hopper, 33 N. Y. 619; Hall v. Hall, 38 Ala. 131; Den d. Trumbull v. Gibbons, 2 Zab. 117; Barnes v. Barnes, 66 Maine, 266; and cases cited in ch. xi. sec. ii., post.

Dew v. Clark, 3 Add. Ecc. 79. In this case it was alleged that the deceased conceived an irrational antipathy to his daughter, his only child in her earliest infancy, and that he was actuated by such antipathy dur

to be a sound rule which holds that the delusions which indicate the existence of insanity are either delusions of the senses or such as relate to facts or objects.¹ It is said: "If a man really believes that he is made of glass, or that he is the Christ, or that he is dead, and persists in the opinion, we readily conclude that he is the victim of hallucination or insane delusion, because such opinions are inconsistent with the condition of sanity. But we can draw no such conclusion from the mere belief in witches, ghosts, dreams, or spiritual manifestations, or in strange or absurd views on scientific or religious subjects, because such opinions are consistent with sanity." The application of these rules to specific cases will be found considered elsewhere.

§ 15. Not only is delusion, ordinarily, the test of the existence of insanity, but the degree of insanity, as partial or total, is to be measured by the extent and number of the delusions existing in the mind of the insane person, who, if his delusion exist upon one certain subject only, is to be deemed insane upon that subject, but not upon others.⁸ Thus one possessed of insane delusion may be capable, in the view of the law, of transacting complicated and important business the subject-matter of which does not come within the scope of his delusions.⁴ And the mere existence of delusion unconnected with the act done will not excuse an unlawful act committed by a person partially insane.⁵ It has been attempted in several

ing and throughout the whole remainder of his life; and that the will was founded in, and owing solely to, this irrational antipathy, and in consequence was not the act of a testator of sound and disposing mind. And it was further alleged that there was apparent insanity or mental aberration visible in, and to be collected from, other parts of the deceased's conduct, though at the same time principally betraying itself in his feelings towards and treatment of his daughter.

- ¹ Regina v. Burton, 3 F. & F. 772.
- ² Chafin Will Case, 32 Wis. 557.
- * Forman's Will, 54 Barb. 274.
- ⁴ Smee v. Smee, L. R. 5 P. D. 84; Jenkins v. Morris, L. R. 14 Ch. D. 674; Banks v. Goodfellow, L. R. 5 Q. B. 549.
- ⁵ McNaghten's Case, 10 Cl. & Fin. 200; State v. Spencer, 1 Zab. 196. In McNaghten's Case it was held that one laboring under partial insanity must be considered in the same situation in respect of criminal responsibility as if the facts respecting which his delusion existed were real.

cases to establish the rule that, the mind being an integer. existence of a single delusion should be conclusive evide of such general unsoundness in the mind of its subject a render all his civil acts invalid and his unlawful acts excusa in other words, that the law cannot recognize the existe of partial insanity. Upon this subject Sir John Nichol served: "It has been said . . . that this partial insanit something unknown to the law of England. If it be me by this that the law of England never deems a person t sane and insane at one and the same time upon one and same subject, the assertion is a mere truism. . . . But if . it be meant . . . that the law of England never deem party both sane and insane at different times upon the s subject, and both sane and insane at the same time u different subjects, . . . there can scarcely be a position m ... adverse to the ... current of legal authority." 2 these expressions are fully in accord with the weight of m ern authority.

(b.) Exceptions to the Rule.

§ 16. Since the modern law includes in the term "insanit all forms of mental disease, however arising, as well the included under the ancient definitions of idiocy or demen as those falling within the technical definition of lunacy follows that, although formerly insanity was never held be established in any case where delusion had not at so time prevailed, there exists a class of cases in which delus is not the criterion of the existence of insanity. Such ca are those in which there has existed, ex nativitate, so general weakness of intellect as to render the subject of reasoning and irresponsible, and those in which the mind is become weakened and disorganized, either from the occi-

¹ See Groom v. Thomas, 2 Hagg. Ecc. 433; Waring v. Waring, 6 M. P. C. C. 341; expressions in Dyce Sombre v. Troup, Dea. & Sw. Smith v. Tebbitts, L. R. 1 P. & D. 398. The doctrine of these cases been overruled repeatedly, and is not law. See ch. ix. sec. i. and not

² Dew v. Clark, 3 Add. Ecc. 79. See also Hale P. C. part 1, ch. p. 29.

⁸ Wheeler v. Alderson, 3 Hagg. Ecc. 574.

rence of disease or the gradual growth of senile dementia. In such cases the patient cannot be said, properly, to be the subject of delusion, since, ordinarily, he has not sufficient mental power to form any conceptions, true or false, of the relations and sequences of facts and circumstances. confusion has arisen in cases where the courts, while including in the term "insanity" all forms of mental disease, have laid down, in cases not included in the technical definitions of lunacy, the rule that delusion is the sole test of the existence of insanity; but the fact of the possible existence of insanity without delusion is now clearly recognized. Thus it is held that where the party is laboring under an insane delusion, his sanity is to be tested by directing his attention to the subject-matter of the delusion; but where he is afflicted with habitual insanity not accompanied by delusions, his sanity is to be tested by his answers to questions, his apparent recollection of past transactions, and his capacity of reasoning justly in regard to them and in regard to the conduct of individuals.1 So in determining testamentary capacity, cases of unsoundness resulting from dementia or loss of mind are considered exceptions to the rule which makes delusion the test of insanity.2 And a late English case clearly lays down the rule that imbecility or loss of mental power existing to a certain degree, and from whatever cause arising, and although unaccompanied by frenzy or delusion, constitutes unsoundness of mind amounting to lunacy within the meaning of the English law.8

SECTION VII.

LUCID INTERVALS.

§ 17. It is obvious that in cases of idiocy, properly so called, existing from the birth of the subject, or of a gradual decay of the intellectual powers induced by disease, such as softening of the brain or paralysis, intermissions of the disease can

¹ Nichols v. Binns, 1 Sw. & Tr. 239.

² American Seamen's Friend Soc. v. Hopper, 88 N. Y. 619.

^{*} Regina v. Shaw, L. R. 1 C. C. 145.

rarely or never occur. But in the general class of ca where the existence of insanity is determined by the ma festation of specific delusion, lucid intervals may often occ and these are to be determined by, and are coincident w the intermissions of the delusion. And it is said that constitute a lucid interval the party must be in a condit of mind, freely and voluntarily and without any design pretending sanity, to confess his delusion.2 But since, law, the subject's sanity is always to be tested by his capac to perform with understanding and responsibility the spec act the quality of which is in issue, it follows that by a lu interval is not necessarily intended a perfect restoration reason, but a restoration so far as to enable the subject comprehend and do the act in question with such percepti memory, and judgment as to make the act valid and render the actor responsible for its consequences.8 A during intervals of perfect restoration to sanity the law v consider all acts of the party as done by a person perfec capable of contracting, managing, and disposing of affairs; 4 and this is the rule although the party has be pronounced insane upon an inquisition or other appropria proceedings.5

SECTION VIII.

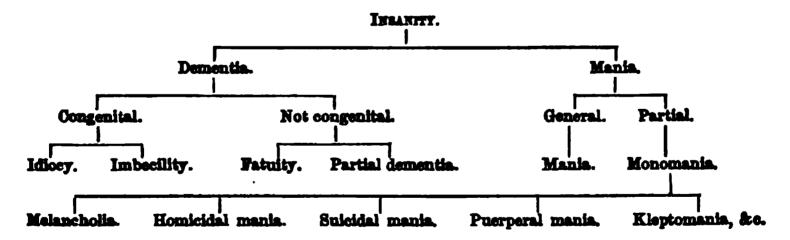
RULES OF DEFINITION ADOPTED.

- § 18. As fairly to be deduced from the tenor of t authorities already cited, the following rules may be la down as applied by the law at the present day in defi
- In delirium, or that fluctuating state of mind created by tempora excitement, in the absence of which, to be ascertained by the appearance the patient, he is most commonly really sane, the probabilities, a prior in favor of a lucid interval are infinitely stronger than in cases of permonent, proper insanity; and the difficulty of proving a lucid interval is le in the same exact proportion. Brogden v. Brown, 2 Add. Ecc. 441.
 - ² Waring v. Waring, 6 Moo. P. C. C. 341.
 - * Frazer v. Frazer, 1 Del. Ch. 120.
 - 4 Hall v. Warren, 9 Ves. 605; Towart v. Sellers, 5 Dow. 231.
 - ⁵ Gangwere's Estate, 14 Penn. St. 417.

ing legal insanity: 1. The words "lunatic," 1 "insane," and "non compos mentis" are generally convertible and generic terms, and include all the specific forms of mental disease recognized by the text-writers and medical authorities. he is insane, lunatic, or non compos mentis whose mind is affected by general fatuity, or is subject to one or more specific delusions. 2. Insane delusion consists generally in such an hallucination or false conception in regard to facts or objects as cannot fairly be supposed to exist in a healthy mind, and of which the subject cannot be disabused by reason or argument. 3. When the issue is upon the abstract question of the party's sanity, as in proceedings to place his person and property, for protection, within the custody of the law, it must appear, in order to authorize such protection, that the party is, by reason of mental disease, unfit to be intrusted, safely, with the control of his person or property. 4. When the issue of insanity arises collaterally, —

The word "lunatic" is now used by the courts, adjectively, as synonymous with the word "insane," or, substantively, as synonymous with "insane person;" and this usage has, for convenience, been adopted in the present work. The technical signification of the word has already been explained. See §§ 1, 2, ante.

The following analysis of the medical nomenclature of insanity is compiled by Mr. Pope, who has followed Dr. Taylor as his principal authority. See Pope, Lun. 7; 2 Taylor, Med. Jur. 476 et seq.



Since the law does not, in its inquiries concerning insanity, regard its pathological aspects, its causes, or its extent, except in so far as these may affect incidentally the question of the subject's responsibility for the act which in a given case is the subject of inquiry, it would be foreign to the subject of this work to cite those books of medical science in which the pathological aspects of insanity have been ably considered, but which are not authorities in the courts of law.

that is, upon the determination of the quality of the particivil act as being valid or invalid, or of his unlawful act being innocent or criminal,—the question is whether, reason of mental disease, the party was unable to completed the nature of the act, its relations, effects, and le consequences.

CHAPTER II.

OF THE LEGAL JURISDICTION OVER INSANE PERSONS AND THEIR ESTATES.

SECTION I.

CONSTITUTIONAL RIGHTS OF INSANE PERSONS.

(a.) In general.

§ 19. The mere fact of the existence of insanity cannot of itself take away or abridge the civil rights of the subject, since, under a constitutional government, no man can be deprived of his liberty without the judgment of his peers; and it matters not to the law whether the alleged cause of his detention be insanity or crime. Thus a statute providing for the confinement of persons acquitted of criminal offences on the ground of insanity, until such persons should be discharged upon the certificate of certain officers who might be summoned for that purpose by the prison inspectors, was pronounced to be in plain violation of the constitutional safeguard against restraints of personal liberty without due process of law; and it was said that the proceedings contemplated by the statute were not only inquisitorial and exparte, but such as could not be set in motion except at the

Brewster, J., in Commonwealth, ex rel. Stewart, v. Kirkbride, 2 Brews. 419; Same, ex rel. Nyce, v. Same, id. 400; but see Same, ex rel. Haskell, v. Same, 3 Brews. 586. In the two former cases the court intimate a doubt whether the detention of an insane person, even after a finding of lunacy, is justifiable, unless there appear to be danger to the person himself, or to his estate, or to the public, from his remaining at liberty. See also Commonwealth v. Western Penn. Hospital, 3 Pitts. 299, in which case it was held that, under the provisions of the act of April 20, 1869, no insane person could legally be committed to an insane hospital unless it appeared that the welfare of the patient or the safety of others required such restraint.

² Mich. Laws 1873, act No. 168.

will of the prison inspectors, so that the liberty of the subje was left by the statute at their uncontrolled discretion. 1 I the same case the court, in an elaborate opinion, considered the English practice in respect of the detention of insationinals "during the Queen's pleasure," 2 and observed "In this country, where all legislation must be within constitutional limits, and does not reach the full parliamental range, private liberty can never be subjected to the mediscretion of any person. . . . Every person has a right at a times to resort to the courts to have the legality of restrain determined, unless he is imprisoned under a valid judy ment under proceedings where he had a regular trial chearing." 8

§ 20. It follows that, except in a class of cases hereafte referred to,4 any person who, without authority of lav assumes to arrest, detain, or confine an insane person, acat his own peril, and will become liable for his act as if th person arrested, detained, or confined were sane. it be material, in defence of such an act, that the defendar in good faith believed the person arrested or detained to k insane. Thus, where a plaintiff had been arrested by a officer not having the warrant required by law, and by him committed to a lunatic asylum, upon suits being brought b the person so committed against the officer and the keepe of the asylum, it was held, on demurrer, that the plaintiff pleadings disclosed a valid ground of action.⁵ So where defendant was convicted, under St. 8 & 9 Vict. c. 100 § 44, of receiving two or more lunatics into her house, no being a registered asylum or hospital, or a house duly license under the above act or under any previous act, but it wa specially found by the jury who convicted that, though th persons so received were lunatics, the defendant honestl and on reasonable grounds believed they were not lunatical

¹ Underwood v. The People, 32 Mich. 1.

² See ch. xiii. sec. v., (c).

^{*} Per Campbell, J., Cooley and Graves, JJ., concurring. See Coon to Cook, 6 Ind. 268.

⁴ See § 23, post.

⁵ Look v. Dean, Same v. Choate, 108 Mass. 116.

it was held by the court (Coleridge, C. J., and Denham, Pollock, Field, and Stephen, JJ.) that such belief was immaterial and that the conviction was right. So a physician is not warranted, merely on statements made by the relations of a supposed lunatic, in sending men to take him into custody and confine him, unless satisfied from the statements made that such a step is necessary to prevent some immediate injury being done by the supposed lunatic, either to himself or others. And a physician who, without due inquiry, signs the certificate required by the English Lunacy Acts, as preliminary to the detention of an alleged insane person, is liable to such person in an action of trespass for resulting damages, even if he acts in good faith. So where

Regina v. Bishop, L. R. 5 Q. B. D. 259. See Regina v. Fellows, Fortescue, 166; Dobbyn v. Decow, 25 U. C. C. P. 18; Force v. Probasco, 43 N. J. Law, 539. Under the statute 14 Geo. III. c. 49, making the maintenance of an unlicensed house for the reception and custody of lunatics a penal offence, it was held that the superintendent of such a house was liable to the penalties of the statute although he had no share in the profits of the establishment. Budd v. Foulks, 3 Camp. N. P. 404.

One who maliciously and without probable cause institutes, or procures to be instituted, against another an inquisition of lunacy is liable to the latter, on his discharge, in an action for malicious prosecution for all damages suffered by him. Lockenour v. Sides, 57 Ind. 860. But if the institution of the inquisition is not malicious nor without probable cause, it is said not to be actionable. Hinchman v. Richie, Bright. (N. P. Phil.) 143.

- ² Anderdon v. Burrows, 4 C. & P. 210.
- * Hall v. Semple, 8 F. & F. 337. But it seems that an action of conspiracy for confining the plaintiff in a lunatic asylum cannot be sustained if the defendants conscientiously believed that the plaintiff was deranged, and required for his recovery medical treatment under restraint. And it is further said in the same case, that although a conspiracy be proved, yet neither the signing of the certificate by a physician nor the receiving and keeping of the plaintiff in an asylum by its officers, or the serving as juror on the inquest, afterwards set aside, by which the plaintiff was found lunatic, will render the physician, officers, or members of the inquest co-conspirators, unless they had knowledge of the conspiracy, and their acts were corruptly done. Hinchman v. Richie, ubi supra. See Higenbotam v. Green, 25 Hun, 214. Where the overseers of poor, of a town, retained in their charge as a pauper an insane person not needing relief, for the sake of a profit to be made by the town out of his labor, and they let out his labor for a year to one who paid the town an agreed

the law has prescribed means for the arrest or detention insane persons, those to whom the duty of effecting s arrest or detention is committed will be liable for the neg of any material requirement of the statute in that reg Thus it is held to be essential that a warrant to commit a son as a dangerous lunatic, under the statute 30 & 31 V e. 118, should recite on its face that the magistrates cal in the assistance of a proper medical officer to examine party, and that such officer gave a proper certificate authorize the commitment. And a magistrate committi and a medical superintendent of a lunatic asylum deta ing, a person committed under an informal warrant, defect for omitting such essential statements, were held liable damages to the person committed in an action for false i prisonment. It follows, as an obvious application of t principle stated, that proceedings in lunacy, had before tribunal not authorized to entertain them, will be coram n judice and void.2 And the same rule will hold when t

sum therefor, beyond providing for the insane person's support, it wheld that the insane person might waive his remedy against the overse for the personal injury, and recover the money of the town in an actifor money had and received. Abbot v. Fremont, 84 N. H. 432.

¹ Coghlan v. Woods, 10 L. R. Ireland, 29. One Maltby, a Europea charged with having caused the death of a person in India, was visited his bungalow by the district magistrate, who attended there with w nesses intending to investigate the charge. In consequence of the state mind of Maltby, and the report made thereon to the district magistrate I two physicians, proceedings were stayed under the provisions of the India Criminal Code of 1872, and Maltby was removed to Madras under a order of the Madras government. The High Court at Madras, on a application to them for the release of Maltby, determined that he was lav fully in custody, and called the attention of the Madras government 1 St. 14 & 15 Vict. c. 81. The Madras government thereupon ordered his removal to England, under sec. 1 of that statute; and on his arrival i England he was, by a warrant of the Home Secretary, confined at first i Broadmoor Criminal Lunatic Asylum, and afterwards in a private lunati asylum. It was held, on the argument of a rule for habeas corpus, tha Maltby was a person charged with a crime or offence in India, and no tried on the ground of his being found to be of unsound mind, within 14 & 15 Vict. c. 81, and that his detention and confinement in the private asylum were lawful. Malthy, in re, 14 Cox C. C. 609.

² Laughinghouse v. Laughinghouse, 38 Ala. 257.

proceedings commenced in due form have not been perfected by a proper and formal decree or judgment.¹

(b.) Remedy in Cases of Infringement.

- § 21. Although the prescribed forms of procedure are complied with in the arrest and detention of a supposed insane person, yet, in the absence of statute protection to the persons engaged in such arrest and detention, the authorities substantially agree that, if the person arrested or detained be in fact sane, the persons arresting or detaining him will be responsible to him therefor in damages, provided he seasonably makes known his objection to their acts.2 Thus, in an action for false imprisonment it was alleged in defence that the defendant was the keeper of a lunatic asylum, and that it was certified to him by the wife, mother-in-law, and physician of the plaintiff that the plaintiff was in a state of mental derangement, and that his confinement was necessary, and that the defendant was requested by the wife and mother-in-law of the plaintiff to take and receive the plaintiff into his asylum and there confine him, and that, relying on the truth of the statements so made, and believing that the confinement of the plaintiff was necessary to prevent him doing immediate injury to himself or some other persons,
- In Hovey v. Harmon, 49 Maine, 269, it was held that whatever disability was imposed upon a person by the appointment under the statute, by the judge of probate, of a guardian over him, as a person non compos mentis, without a previous formal decree as to his mental condition, was removed by the subsequent discharge, by the judge of probate, of such guardian upon his own petition, and without notice.
- But if no objection is made by the supposed insane person to his own seclusion, he cannot complain of it afterwards. Van Deusen v. Newcomer, 40 Mich. 90. In this case the court was divided upon the question whether the superintendent of a lunatic asylum was liable for the detention of a sane person whom in good faith he believed insane; Campbell, C. J., and Cooley, J., holding that he was liable, and Marston and Graves, JJ., holding the contrary view. The case contains an elaborate discussion of the whole question. The same division of opinion occurred upon the question whether an inquisition to determine the insanity of the party was an essential prerequisite to his confinement in an asylum. Campbell, C. J., and Cooley, J., holding that it was, and Marston and Graves, JJ., that it was not.

the defendant, for the purpose of confining the plaintiff, to prevent him doing immediate injury to himself or s other persons, did the acts complained of. Upon a gen demurrer the defendant's plea was held bad, since it did allege that the plaintiff was in fact a lunatic.1 action for assaulting and imprisoning the plaintiff, the fendant pleaded that before and at the time, &c., the plain had conducted himself as a person of unsound mind, incompetent to take care of himself, and proper to be ta care of and detained under due care and treatment; t two medical certificates had been given by persons d authorized according to the provisions of Stats. 8 & 9 V c. 100, and 16 & 17 Vict. c. 96, certifying that plaintiff v of unsound mind, and proper to be taken care of and tained; that defendant had notice of the certificates, a had reasonable and probable grounds for believing, and believe, them to be true, and believed that plaintiff v of unsound mind, &c.; and that defendant, being plainti uncle, and a proper person to cause him to be taken in char and detained, did, for the causes aforesaid, cause him to taken charge of and detained as a person of unsound min This was held a bad plea, inasmuch as, at common law, t defendant would be justified only if the plaintiff were actua insane at the time, which the plea did not allege.2

§ 22. In cases where a person, whether sane or insane, detained or confined as a lunatic without authority of la it appears that such person is entitled to be brought in court upon a writ of habeas corpus, in order that the que tion of the legality of his detention may be inquired into

¹ Bell v. Allen, 2 Jones Exch. 448.

² Fletcher v. Fletcher, 1 Ell. & Ell. 420. See also Look v. Dea Same v. Choate, 108 Mass. 116; Colby v. Jackson, 12 N. H. 526; Day v. Merrill, 47 N. H. 208. The English statute 8 & 9 Vict. c. 100, § 9 protected parties duly and bona fide engaged, under proper certificates, the arrest or detention of supposed lunatics. This provision applies the keepers of duly licensed asylums for the insane; but the protectic afforded by it is not extended to persons making the order for commiment. Fletcher v. Fletcher, ubi supra; Norris v. Seed, 3 Exch. 782. See Hill v. Philp, 7 Exch. 232.

^{*} Rex v. Wright, 2 Strange, 915; Rex v. Turlington, 2 Burr. 1114

But it is necessary that the affidavit should show that the detained person is not a dangerous lunatic, and that he is in a fit state to be removed; and the court may, if necessary, enlarge the time for making the return. On an application for the writ in such cases it should be made to appear that the party promoting the application was acting under due authority from the alleged lunatic. The remedy by writ of habeas corpus, however, would seem to be confined to those cases (1) in which the confinement of the person does not appear to have been authorized by any form or color of legal process, or (2) in which the form of proceeding was not so far according to the course of the common law as to constitute a suit at law, and so admit the party to his remedy

Rex v. Choate, Lofft, 73; Regina v. Pinder, 24 Law Jour. N. s. Exch. 148; Norris v. Seed, 3 Exch. 782; Commonwealth v. Kirkbride, 2 Brews. 400; Commonwealth v. West. Penn. Hospital, 3 Pitts. 299; Underwood v. The People, 32 Mich. 1. But see Denny v. Tyler, 3 Allen, 225, in which case the court refused the writ of habeas corpus in favor of an insane person confined in a lunatic asylum by her husband, although it did not appear that her remaining at large would be dangerous either to herself or others. The only precedent cited by the court is Oakes, in re, 8 Law Rep. (Mass.) 122; but in that case the judgment of Chief Justice Shaw was distinctly based upon the assumption that the lunatic's remaining at large would be dangerous to himself or others. See § 23, post. It is to be observed that in Denny v. Tyler the motion for the writ was made solely of the husband's own motion; but the writ does not appear to have been refused on that ground.

¹ ____, ex parte, 3 Dow. Pr. Ca. 161.

Rex v. Clarke, 3 Burr. 1362. Thus upon motion for a habeas corvus to bring up the body of J. C., who was confined in a lunatic asylum, the court granted only a conditional rule; but ordered that Dr. S. should in the mean time and at all reasonable times have free access to the said J. C. at the lunatic asylum, in the absence of the physician under whose care, and in whose custody, J. C. was. And upon showing cause, it having appeared that a commission of lunacy had issued against J. C. upon which an inquisition was soon to be held, and it not appearing satisfactorily from the affidavits that J. C. was free from derangement, the court enlarged the time for showing cause until the first day of next term, to allow of the fact of J. C. being a lunatic or not, being ascertained under the commission. Carpenter, ex parte, Smith & Batty, 81. As to the proper form of the return to the writ in such cases, see Fell, in re, 3 Dowl. & Lowndes, 878.

³ Child, ex parte, 15 C. B. 237.

by writ of error. Thus it is held that habeas corpus is the proper remedy to test the validity of an order of c made in pursuance of a statute, and committing to pr until further order, one who has been tried for murder acquitted by reason of his existing insanity, when the q tion involves a review of the form of the order, in which it should be raised by writ of error or other appropr remedy.¹

¹ Underwood, in re, 30 Mich. 502. See Comp. Laws Mich. § 7 In New York, by the statute of 1874, c. 446, tit. 10, as amended by ute of 1876, c. 267, § 4, the appointment of a state commissione lunacy is directed who has a broad authority to institute a judicial quiry into cases "where, from evidence before him, he has rea to believe that any person is wrongfully deprived of his liberty, c cruelly, negligently, or improperly treated, in any asylum, institution establishment, public or private, for the custody of the insane; " an such facts are proved to his satisfaction he may issue an order, in name of the people of the state, directed to the superintendent or n agers of the institution, to modify such treatment or apply such remedy both, as the order may direct. In case of disobedience of such an or the commissioner is to present the matter to a justice of the Supre Court, who may thereupon issue an order to the superintendent or m agers to show cause why the order should not be complied with. Un these provisions it was held in Ayer's Case, 3 Abb. N. C. 218, that commissioner might inquire, not only into the legality of the origi commitment, but also into the propriety of continued detention, and t a commitment to an asylum under the forms prescribed by the comm sioner may be deemed to have the same effect as to the liberty of the r son as had a commitment by a committee of a lunatic's person after of found. And the case further holds that when an asylum superintender has reasonable doubt as to the right to detain a patient after appearant of recovery, he may apply to the commissioner for a melius inquirendu citing Roberts, ex parte, 3 Atk. 5; Rex v. Hethersal, 3 Mod. 80; Rex Saloway, id. 100. But it appears to be held well settled in Engla that a melius inquirendum cannot be directed in lunacy. See Cranmi ex parte, 12 Ves. 454; Atkinson, ex parte, Jac. 333; Holmes, in re, 4 Ru 182; Pope, Lun. 70, 75, where the authority of Roberts, ex parte, questioned.

As to the powers and duties of the state commissioners general under the above acts, see King's County Insane Asylum, in re, 7 Ab N. C. 425; People v. Osborn, 57 Barb. 663.

(c.) Dangerous Lunatics may be restrained.

- § 23. As the inherent jurisdiction of the state over persons of unsound mind rests in part upon its duty to protect the community from the acts of those who are not under the guidance of reason,1 it follows, as an exception to the rule already stated,2 that if any person is so insane that his remaining at liberty would be dangerous to himself or the community, any other person may, without warrant, or other authority than the inherent necessity of the case, confine such dangerous insane person, but only during so long a time as may be necessary to institute and carry to a determination proper proceedings to inquire into the party's condition and provide for his legal custody.8 And it is as competent for a magistrate, as conservator of the peace, to order into custody an insane person who is in the act of committing a breach of the peace, as to order the arrest of a sane man under like circumstances; for, although the insane man may be incapable of crime, he may lawfully be prevented from doing harm.4 So it is said that any man
 - ¹ Colah, re, 3 Daly, 529. ² See § 20, ante.
- * Colby v. Jackson, 12 N. H. 526; Davis v. Merrill, 47 N. H. 208; Van Deusen v. Newcomer, 40 Mich. 90; Rex v. Gourlay, 7 B. & C. 669; Hinchman v. Richie, Bright. (N. P. Phil.) 143; Williams v. Williams, 2 Hun, 111. The law guards jealously the rights of persons arrested and detained, without express authority, as being dangerously insane. Thus in Colby v. Jackson, supra, the plaintiff being insane, and it being dangerous to permit him to be at liberty, the defendant, one of the selectmen of the town, confined him. He then, with the other selectmen, applied to the judge of probate for an inquisition upon the plaintiff. A warrant was issued, and the selectmen made an inquisition and declared their opinion to be that the plaintiff was insane, but made no return of the inquisition to the judge of probate; and no further proceedings were had, but the defendant still kept him in confinement. It was held, upon these facts, that the defendant was a trespasser ab initio, but that he might show, in mitigation of damages, that he made inquiries which led him to believe that it would be dangerous for the plaintiff to remain at liberty. Now, under Rev. Sts. N. H. c. 9, § 16, it is held that where the friend of a lunatic employs the selectmen of a town to commit him to the state asylum, an action of trespass will not lie against the selectmen acting in good faith and not using unnecessary force. Davis v. Merrill, supra.
 - 4 Lott v. Sweet, 83 Mich. 808.

may justify an assault when it may restrain the fury lunatic and prevent mischief, since it is well settled common law that a private person may lawfully seize detain another in certain cases; as to restrain him from chief, or to part him from one with whom he is fighting to prevent a drunken man from going along the st without help. And it is not necessary, in order to just the arrest and restraint of the insane person, that he sho at the time of arrest, be actually engaged in the commis of violence; for any insane person may be restrained of liberty, by his family or others, to such an extent and such a length of time as may be necessary to prevent in or danger to themselves or to the lunatic.2 So an office the law is justified in arresting and detaining one wi there is probable cause to believe insane and about to con a mischief which would be criminal in a sane person; such detention may lawfully be continued till it can be fa presumed that the person detained has forgotten or abando his mischievous purpose.8 And at common law, independ of statute authority, a physician may justify measures ne sary to restrain a dangerous lunatic.4

- ¹ Brookshaw v. Hopkins, Lofft, 243. Where one, being in lawful tody as a daugerous lunatic, was found lunatic by inquisition, it was that, in order to deliver the lunatic's person to the committee, one c must be made, under the act, discharging him from custody, and and in lunacy, that the committee take possession of the lunatic when charged. Flanagan, in re, 2 Jones & La T. 343.
- Oakes, in re, 8 Law Reporter (Mass.), 122, judgment by Shaw, (18 Paetz v. Dain, 1 Wilson, 148.
- A Scott v. Waken, 3 F. & F. 328; Symm v. Fraser, id. 859. In Bru Case, 3 Abb. N. C. 225, it was held that one who has been committed dangerous lunatic may be discharged by the commissioner in lunacy pointed under the Stat. 1874, c. 446, 1876, c. 267, cited § 22, note, or own petition, after sufficient lapse of time has shown that although on the borderland of insanity he has measurably recovered from attack, and is competent for all his civil rights in a quiet and discipli mode of life, although he be, perhaps, not clearly within the rule of crim responsibility for crimes committed with violence, and involving in t commission the element of criminal intent.

(d.) Right to Jury Trial.

§ 24. It being admitted that, under a constitutional government, no person is to be deprived of his personal liberty or of his power to enter into contracts binding himself or his property without due process of law, the conclusion follows that no person can lawfully be declared insane, his personal liberty restrained, and the control and management of his property taken from him by a judicial determination of the issue of insanity vel non, unless, upon the original trial of the issue, or on appeal therefrom, such person may, as matter of right, obtain the verdict of a jury upon the facts and evidence This is a rule recognized by the English law, produced. Lord Eldon having laid it down as unquestionable that the crown has not, in England, the power of taking upon itself the care of any individuals, either as to their persons or property, on the ground that they are of unsound mind, without the verdict of a jury. The rule is believed to be supported by the weight of authority in the United States.2 Thus in New Jersey it is said that no person can be deprived of the right to manage his own affairs, or of his personal liberty, without the intervention of a jury, and that in cases of lunacy the verdict of a jury is to be founded, as in all other cases, upon satisfactory and competent evidence.8 And in Vermont it was held that an appeal should be allowed, as of right, from a decree of a probate court appointing, under statute authority, a guardian to an idiot, non compos, lunatic, or distracted person.4 So in Illinois a statute authorizing

¹ See Shelf. Lun. 35, 60; Bryce v. Graham, 2 Wils. & Shaw, 481, 517. By the Lunacy Regulation Acts, 16 & 17 Vict. c. 70, § 40 et seq., and 25 & 26 Vict. c. 89, § 8 et seq., provision is made for the trial of the issue of insanity before a jury when, upon an inquisition, the alleged lunatic demands a jury, except in cases where the lunatic clearly appears mentally incompetent to frame such a demand. See Crompe, in re, L. R. 4 Ch. App. 653.

² See § 19, ante.

² Dey, in re, 1 Stock. 181.

⁴ Shumway v. Shumway, 2 Vt. 339. And see opinion of Sedgwick, J., in M'Donald v. Morton, 1 Mass. 543. In the latter case it was held that the appellant need not give bonds to prosecute such an appeal, although such bonds upon appeals from the probate court were required by stat-

the apprehension and confinement of insane persons was I to intend such as had been found insane by a jury, si otherwise the act would be unconstitutional. And in I souri, where the statutes expressly provide for the intertion of a jury in cases of alleged insanity, proceedings in warranto against the incumbent of a public office, declar such office vacant by reason of the incumbent's insanity, w pronounced illegal.

(e.) Trustees of Lunatics, in invitum.

- § 25. In the contemplation of a court of equity every property son who intermeddles in the matter of a lunatic, without cappointment, is intended to be interested for the lunat advantage. Thus where one had been duly appointed comittee of the estate of a lunatic, and it appeared that he lute, since it was said "the letters of guardianship will either be repeared in that case the appellees entitled to no costs, and the bond, of coum wholly unnecessary; or the guardianship will be confirmed by the dishest of the petition, ... because the appellant is proved to be non comments; and in such circumstances his contracts in general, and, of coursuch bond, would be void."
 - ¹ Smith v. The People, 65 Ill. 875.
- ² State v. Baird, 47 Mo. 301. See Gaston v. Babcock, 6 Wis. 503. Rev. Sts. Wis. c. 85, § 24, it was provided that an appeal might be ! from the order of a judge of probate appointing a guardian for an inst person, and that upon the appeal a jury might be ordered, if necessa The constitution of Wisconsin, art. 1, § 5, provides that the right of tr by jury "shall remain inviolate and shall extend to all cases at law." the above case, the court held that the proceedings for the appointment a guardian, without the intervention of a jury, were not a "case at lav within the intent of the clause of the constitution referred to, and were r repugnant thereto. But the court expressed itself as satisfied that the rig of trial by jury was "substantially secured" to the party by the provisic of the local law providing for an appeal to the Circuit Court from an ord of the judge of the probate or county court appointing a guardian for insane person. So in Iowa it has been held that art. 1, § 10, of the co stitution of that state, providing that in criminal prosecutions, and cas involving life or liberty, the accused shall be entitled to a speedy as public trial by an impartial jury, &c., does not apply to an inquest lunacy before commissioners under the statute, the statute providing f an appeal to the Circuit Court from the decision of the commissioner Black Hawk County v. Springer, 10 N. W. Rep. 791.
 - * Ball, in re, 2 Molloy, 145.

managed it as a volunteer for nine years before the issuing of the commission, he was held bound to pay interest upon the savings of the estate, although he alleged he had made no use of them.1 And where a probate court assumed to appoint a guardian for a lunatic without inquisition or notice, it was held that the person so unlawfully appointed might be charged as trustee of the supposed lunatic, in invitum, and compelled to account in the chancery court.2 And where a solicitor who had acted in some of the proceedings under a commission of lunacy, afterwards, as attorney for the lunatic's creditor, took judgment and obtained an execution against the lunatic, and seized his household furniture thereon, it was held that the Lord Chancellor might restrain the sale of the furniture upon the lunatic's committee giving security for its value, to be paid by instalments out of the savings from the income of the estate.8 Where the son of an insane mortgagor, acting without authority in behalf of the mortgagor, agreed with the mortgagee that a decree of foreclosure and sale, not then made, should not, when made, satisfy the mortgage debt, but that the purchaser thereunder should hold the land in trust to sell for the further benefit of the mortgagee, it was held after decree that the contract was not obligatory upon the insane mortgagor, and that although the decree, being regular, could not be treated as a nullity and might be operative as to third persons, yet any title acquired thereunder by the purchaser or mortgagee should be held in trust for the mortgagor.4

- ¹ Chumley, ex parte, 1 Ves. 156. In general, expenditures made by one as committee, without previous appointment, are not to be allowed. Hilbert, ex parte, 11 Ves. 397.
- 2 Moody v. Bibb, 50 Ala. 245. Where, upon his restoration to reason, a lunatic sued one who had assumed to act as his guardian in an action for money had and received, being the balance of sums remaining in the quasi guardian's hands, the latter, having accounted as guardian, was held to be estopped to deny that he was legally appointed. Shepherd v. New-kirk, 1 Zab. 302.
 - * Ball, in re, 2 Molloy, 145.
- ⁴ Lockwood v. Mitchell, 7 Ohio St. 387. It was further held in the same case, the contract having been made while the insane mortgager had a suit pending against the mortgagee impeaching the mortgage debt for usury, that the trustees of the lunatic might require an account of the

§ 26. By the application of a like principle to that st above, it was held that one who had received from the mittee of a lunatic bonds which showed on their face they belonged to the estate of the lunatic, was bound in eq to account to such estate for what he had received them, although he had paid full value for them, and k nothing of the state of the committee's accounts. decision was based on the general equitable ground when bonds in the hands of a fiduciary are transferred assigned, and the consideration of the transfer or assignn is a personal debt due from the fiduciary, and the assig takes with notice of the trust, the law holds the latter to a party to the breach of trust. But it is apprehended the court will exercise an equitable discretion in fixing liability to account of persons who without authority h assumed the management of a lunatic's estate. case where it appeared that on account of the imbecility an adult legatee, the executors, in proper time and in g faith, set apart the amount of her legacy, and, after the p ment of the legacy duty and incidental expenses, invested balance in consols in their own names and accumulated dividends, but did not transfer the amount into court un the act, and a bill was filed for the payment of the legacy cash, with interest, the court refused to disturb the inve ment, and directed it and its accumulations to be brought is court; and it appearing that the legatee was of imbecile mi at the date of the testator's will, the court, on that ground gave costs out of the testator's general estate.2

excess of interest beyond the lawful rate, upon a bill filed to make mortgagee account for the lands and purchase-money received by him discharge of the mortgage debt.

- ¹ Edmunds v. Venable, 1 Patt. Jr. & H. 121.
- 2 Pothecary v. Pothecary, 2 De G. & Sm. 738. In Upfull's Trusts, re, 3 Mac. & G. 281, an order was made on a petition presented by gu dians of the poor under the Trustee Relief Act, 10 & 11 Vict. c. 96, the payment to them out of a fund paid into court by trustees, in who fund a lunatic was interested, of sums expended by the guardians in a support of the lunatic; the Lord Chancellor holding that by the act a court was placed in the position of the trustees, and that the trusteenight have made the payment under the 7 & 8 Vict. c. 101, § 27.

(f.) Rights of Lunatics to hold Property.

§ 27. However far the capacity of an insane person to acquire property by purchase may be affected by the fact of his insanity, such insanity cannot, in general, affect his capacity to take property by inheritance, since "land holden in capite descends upon a lunatick of full age; and it is so found by office." And the same rule applies to chattel interests to which the insane person has become entitled by virtue of contracts made with him prior to his lunacy. Thus where the Duchess of Norfolk had by the terms of her marriage settlement become entitled to pin-money, to be charged upon certain life estates held by her husband, and after her marriage became a lunatic, and was supported by the duke in a manner becoming her rank, it was held, upon the death of the duke, that as the duchess was incapable of consenting or acquiescing in the duke's retaining her pinmoney, his estate was accountable for the arrears of it.2 But where the right to take property depends upon some act of volition or choice of which the insane person is incapable, such right will remain in abeyance during the continuance of the lunacy, and cannot be exercised by the legally constituted guardian of the insane person acting in his behalf. Thus under a statute expressly disqualifying persons judicially found insane from performing any civil act, it was held that the right of a widow to elect to take under the provisions of her deceased husband's will could not be exercised by her, or in her behalf by her guardian, after she had been adjudged of unsound mind.8

Buckley's Trusts, in re, Johns. 700, where a fund belonging to a lunatic had in like manner been paid in under the Trustee Relief Act, 16 & 17 Vict. c. 97, § 104, and such fund had been ordered paid over to the lunatic's parish, to defray past charges assumed in the lunatic's behalf by the parish, it was doubted whether, under the circumstances, the justices had jurisdiction to order seizure of the capital of the fund, or only of the income.

- ¹ Anonymous, Jenkins, 299. And the title vests in the lunatic and not in his guardian or committee. Underhill v. Jackson, 1 Barb. Ch. 73.
 - ² Earl Digby v. Howard, 4 Sim. 580; s. c. 1 Jac. & W. 640; Jac. 235.
 - * Heavenridge v. Nelson, 56 Ind. 90. See 2 R. S. Ind., 1876, 601, § 11.

SECTION II.

HISTORY AND EXTENT OF THE LUNACY JURISDICTION.

(a.) In England.

- § 28. In England the King, as parens patriæ, is consider to be intrusted with the protection of the persons and proper of all his subjects, and to be bound in a peculiar manner protect those who, by reason of imbecility or want of uncestanding, are incapable of taking care of themselves. I not necessary to consider whether this function of the crown arises out of the royal prerogative, or whether it is a duty plied from the existence of the relation of king and subjective its exercise has been vested in the crown by a success of acts of Parliament. The care of the persons and proper
 - ¹ Shelf. Lun. 9.
- 2 By a statute of Edward I., now lost, the King was given the cust of the persons and inheritances idiotarum et stultorum, being such ex n vitate, with a reservation of all lawful claims to the lord of the man See 2 Inst. 14; Beverley's Case, 4 Rep. 125 b. It is to be noticed that the terms of this statute the custody is confined to persons falling un the technical designation of idiots. By the statute de prærogativa re 17 Edw. II. st. 2, c. 9, it was provided that the King should have custody of the lands of natural fools, taking the profits of them with waste or destruction, and should find them in necessaries, rendering lands, after the death of the idiot, to the right heirs. And it was furt enacted by the same statute (c. 10) that the King should provide wh any that beforetime had his wit and memory should happen to fail his wit, "as there are many having lucid intervals," that their lands a tenements should be safely kept without waste and destruction, and the they and their household should live and be maintained competently from the fruits of the same; and the residue . . . should be kept to their u to be delivered to them when they should recover their right mind, a that the King should take nothing to his own use. Although the fi statute authority to protect lunatics, technically so called, is vested in t King by the statute de prærogativa regis, it is said that the crown's rig of custody, both over idiots and lunatics, existed before that statu Grimstone, ex parte, Ambl. 706. By the statute 32 Henry VIII. c. 46. Court of Wards was established, to which was committed the manageme of the persons and lands of idiots and natural fools. This tribunal w abolished by the statute 12 Charles II. c. 24, and its jurisdiction revert back to the King, or, in effect, to the Lord Chancellor, to whom, und the sign-manual of the King, the custody of idiots as well as of lunati

of idiots and lunatics being a trust reposed in the crown, but discharged by its officers, the crown is, in contemplation of law, incapable of malfeasance in the administration of its trust; and it seems that acts done in conducting such administration, if wrongful or fraudulent, are void.2

§ 29. The right of the King to assume the care and custody of his insane subjects falls under the direction of the Court of Chancery, by virtue of a standing warrant to the Lord Chancellor under the sign-manual of the King,3—the royal authority being, in the contemplation of the law, thus delegated merely

was committed. Burford v. Lenthall, 2 Atk. 553. The right which the statutes cited vested in the King and his grantees to an estate in the lands of an idiot during his life has not in modern times been exercised, it being said that, since the Revolution of 1688, the crown has always granted the surplus profits of the estate of an idiot to some of his own family. Rochford v. Ely, 1 Ridg. Parl. Cas. 515. For cases defining and applying this ancient right of the crown to the profit of the lands of idiots, see Shelf. Lun. 10, 11, and cases cited; Tourson's Case, 8 Coke, 170 a; Prodgers v. Phrazier, 1 Vern. 9, 137; 2 Shower, 171, pl. 162; Prodgers v. Freeman, 3 Mod. 43, pl. 16; Anon., Dyer, 303 a; Rochford v. Ely, ubi supra.

- ¹ Fitzgerald, in re, 2 Sch. & Lef. 432.
- The estates and persons of idiots and lunatics are by law intrusted to the King. If, therefore, the King should grant to one that intrudeth upon the possessions of an idiot or lunatic, or takes their persons unlawfully, that he would not meddle with them, but suffer them to do their pleasure, these grants were void. For these were acts of justice and offices of a king which he cannot put off: Cessa regnare si non vis judicare. And in these things the King is never supposed by law ill affected, but abused and deceived." Colt v. Bishop of Coventry, Hobart, 140.
- Eyre v. Shaftsbury, 2 P. Wms. 118; Burford v. Lenthall, 2 Atk. 553. See Van Horn v. Hann, 10 Vroom, 207. Lord Campbell, in his "Lives of the Lord Chancellors," vol. i. p. 14, says: "I clearly apprehend that a commission 'de idiota' or 'de lunatico inquirendo' would issue at common law from the Court of Chancery under the Great Seal, and that the Lord Chancellor, without any special delegation for this purpose, would have authority to control the execution of it, and to make orders for that purpose." And he adds, in a note, that while Lord Chancellor for Ireland he made certain orders in lunacy before the royal warrant under the signmanual had been delivered to him. But he admits that the common opinion is that the Chancellor's authority in lunacy is derived solely from the warrant; and his views, expressed above, do not appear to be supported by the authorities. See notes, infra.

to avoid applications to the King in person.¹ It follows, therefore, that the jurisdiction of the Lord Chancellor in lunacy is wholly distinct from his ordinary chancery jurisdiction under the Great Seal.² But the fact of insanity being once determined, and custody of the lunatic and his property granted, it is considered that the function of the King's warrant is accomplished, so that thereafter the Chancellor acts, in superintending the conduct of the lunatic's custodians, not under the King's sign-manual, but by virtue of his general powers as guardian of the King's conscience.8

(b.) In the United States.

§ 30. In the United States the question whether those tribunals having full chancery powers are therefore, in the absence of express statute authority to that end, invested with power to protect the persons and estates of insane persons has been elaborately discussed. The better conclusion seems to be, that although the power which the Chancellor of England exercises in matters of lunacy is not a judicial power, but a delegated prerogative right, yet the American courts of equity derive a similar right, not from a personal sovereign, but from the commonwealth, which is the fountain of all power and authority; and further, that such power, in the absence of statute provisions expressly creating and defining it, arises exnecessitate for the protection of the persons and property of the members of the commonwealth. These views were adopted in a leading case occurring in Kentucky, and it was further held that a statute requiring the attorney of the commonwealth to institute proceedings for the protection of persons supposed insane was directory merely, and did not divest the

The crown commits the care of lunatics to some great officer; not of necessity to the Chancellor. The warrant confers no jurisdiction, but only a power of administration, and the appeal is to the King in council. Oxenden v. Compton, 2 Ves. 69; s. c. 4 Bro. C. C. 231; Grimstone, ex parte, Ambl. 706.

² The Court of Chancery will not entertain a bill to examine a point of lunacy. Bonner v. Thwaits, Tothill, 130. See Murray v. Frank, Dickens, 555.

^{*} Grimstone, ex parte, ubi supra; Fitzgerald, in re, ubi supra.

Court of Chancery of its general authority in the premises.1 So in Maryland it was said: "Here it has always been admitted that . . . the Chancellor of Maryland was invested with all the powers with which the Chancellor of England had been clothed, as founded on an obvious necessity that the law should place somewhere the care of individuals who could not take care of themselves. . . . And consequently the broad principle may be safely assumed here, that the Chancellor is that judicial officer by whom the State discharges its duties in the care of its infants and lunatics in all cases where the care of them has not been otherwise specially and expressly provided for." But in a later case it was held, whatever might be the true origin of the jurisdiction in lunacy of the English Court of Chancery, that in Maryland the authority of the Chancery Court was derived from the sixth section of the act of 1785, c. 72, which conferred upon the Chancellor full power and authority in all cases to superintend, direct, and govern the affairs and concerns of lunatics, as to the care of their persons and the management of their estates, and to appoint committees or trustees for them.3 The common-law courts of Maryland have concurrent jurisdiction with the Court of Chancery in cases involving the rights of insane persons, since, under the statute of 1785 and its supplements, there was no express ouster of the jurisdiction in such matters

Nailor v. Nailor, 4 Dana, 839. But see, contra, Oakley v. Long, 10 Humph. (Tenn.) 254, where the court, deciding that the entire lunacy jurisdiction in Tennessee was vested by statute (Act 1782, c. 11, Act 1797, c. 41) in the county courts, criticised and dissented from the principles adopted by the court in Kentucky, upon the ground that the lunacy jurisdiction of the English Chancellor, being merely the exercise of a delegated royal prerogative, and forming no part of his proper chancery jurisdiction, the chancery courts in the United States, even if deriving full chancery powers from the English court, could not, therefore, be said to succeed to a statute or prerogative right, really vested in the King, and by him delegated, for convenience of administration, to the Chancellor. To the same effect see Fentress v. Fentress, 7 Heisk. 428. By the St. 1852, c. 163, the chancery courts of Tennessee were given concurrent jurisdiction with the county courts over the persons and estates of idiots and lunatics.

² Corrie's Case, 2 Bland's Ch. 448. Opinion by Bland, C.

^{*} Colvin, in re, 3 Md. Ch. 448.

originally exercised by the courts of common law. In Illinois the State, as parens patriæ, is held to have the same control of lunatics and idiots as is exercised by the Crown of England through the Lord Chancellor, — the jurisdiction in that state being considered as originally vested in the courts of chancery. The same view was adopted after much consideration in Indiana. In North Carolina the jurisdiction in lunacy is considered as having been originally the same in its origin and extent as that of the English Court of Chancery, although since the Revolution it has been enlarged and extended by statutory enactments.

§ 31. In New York the statute gives the care and custody of the persons and estates of lunatics, idiots, and habitual drunkards, without any restriction or limitation, to the Court of Chancery.⁵ In Pennsylvania the authority of the courts over lunatics is held not to be derived from the statutes conferring equity jurisdiction on the courts, but from the provisions of the constitution of the commonwealth.⁶ In South Carolina the care exercised by the courts of chancery over the persons and property of insane persons is considered as a branch of the equity jurisdiction proper, and not, as in England, a function imposed upon the Chancellor and distinct from his functions as a judge of a court of equity.⁷

- 1 Tomlinson v. Devore, 1 Gill, 345.
- ² Dodge v. Cole, 97 Ill. 338.
- * McCord v. Ochiltree, 8 Blackf. 151.
- ⁴ Latham v. Wiswall, 2 Ired. Eq. 294. See St. 1784, c. 228; St. 1801, c. 589; St. 1817, c. 948; Rev. Sts. c. 57; and § 36, post.
- 5 Tracy, in re, 1 Paige, 580; Mason, in re, 1 Barb. 436. "The Chancellor shall have the care and custody of all idiots, lunatics, persons of unsound mind, and persons who shall be incapable of conducting their own affairs in consequence of habitual drunkenness, and of their real and personal estates, so that the same shall not be wasted or destroyed; and shall provide for their safe keeping and maintenance, and for the maintenance of their families, and the education of their children, out of their personal estates, and the rents and profits of their real estates respectively." Rev. Sts. N. Y. 2d ed. vol. i. c. 5, tit. 2, § 1.
- ⁶ Art. 5, § 6. See Eckstein's Estate, 1 Clark, 224. But all the powers of the committee are exercised under the act of June 13, 1836 (Purd. Dig. 979); Kennedy v. Johnston, 65 Penn. St. 451.
 - ⁷ Ashley v. Holman, 15 S. C. 97.

In New Jersey the custody of insane persons and their estates is committed by statute to an Orphan's Court; 1 and in many states the entire jurisdiction in lunacy is, by statute or constitutional provision, intrusted to the courts of probate, — the powers of these in the premises being analogous to those exercised by the ancient Court of Wards in England.² But however this jurisdiction is vested, there is, in its exercise, no marked departure from the rules and principles adopted in like cases by the courts of chancery; and very generally the character of the committee, guardian, or conservator in the American courts is assimilated to that of the committee under the English system.⁸ Thus in South Carolina, where the law courts were given by statute concurrent jurisdiction in the matter of lunacy with the courts of equity,4 it was held that when, in the determination of a matter, the rules in law and equity were conflicting, the equitable rules governing the case were to be followed.5

§ 32. It is to be observed, however, as to the estates and property of insane persons, that a much wider jurisdiction in respect of these than that entertained in the English courts of chancery is vested in those American courts in which the authority over lunatics and their estates is derived from statute provisions, and not from an adoption of the prerogative powers originally vested in the Lord Chancellor of England; for while the possession vested in the committee appointed by the latter is that of a mere bailiff or agent, so that, in the absence of express statute authority, neither the court nor the committee could alienate the property of the lunatic or satisfy the claims of his creditors, the

¹ But the commission issues out of chancery. 1 Rev. Sts. 691.

² See § 28, note, ante.

⁸ Van Horn v. Hann, 10 Vroom, 207; Hovey v. Harmon, 49 Maine, 269; Wheeler v. The State, 34 Ohio St. 394.

⁴ See Walker v. Russell, 10 S. C. 82.

Richards, ex parte, 2 Brev. 375. In this case it was held that the courts of law, in appointing committees for persons non compos mentis, were not bound by the rule of the common law, by which the next of kin to the ward, who in case of his death would take his estate, are excluded from having the custody of his person. See also Campbell v. Campbell, 39 Ala. 312.

lunatic remaining liable to the suit at law of such creditors, the courts in several of the United States have exclusive jurisdiction both to sell the lunatic's property and to determine and satisfy his just debts.

- § 33. In those states where the care and custody of the estates and persons of the insane are committed by law to the courts of probate, and exercised, through guardians or curators appointed by the court, the power of the court in respect of the property of the insane ward is generally the same as that exercised over the estates of minors and spendthrifts; that is to say, the court may upon the petition of the guardian, upon due notice and for good cause shown, order a sale of so much of the ward's property as may be necessary for the payment of his debts, or the maintenance of himself or his family, and this may be done when it is made to appear that his real estate or interests therein may profitably be sold and the proceeds invested in productive personal property. But where there is no general or plenary jurisdiction conferred upon the court by statute or constitutional provision, the jurisdiction is to be considered not as constitutional, but as purely legislative, limited, and special; that is, so far as the statute law confers jurisdiction on the court it may go, but no farther.2
- § 34. In New York, the statute commits to the Court of Chancery the exclusive care and custody of the persons and estates of lunatics, idiots, and habitual drunkards, and it is held in that state that all contracts by such
 - ¹ See Pub. Sts. Mass. c. 140, §§ 1–6.
- Modawell v. Holmes, 40 Ala. 391, 401. So it was held in New Hampshire that a judge of probate had no authority to appoint a guardian for an insane person, until such person had been so returned upon an inquisition of the selectmen of the town where he dwelt. (See Sts. March 21, 1776; Feb. 9, 1791; July 2, 1822.) H—v. S—, 4 N. H. 60. In Minnesota, the jurisdiction over the general subject of guardianship of insane persons, including the appointment of guardians, is vested by the constitution of the state in the probate courts. And the legislative acts (Rev. Sts. 1851, c. 69; Gen. Sts. 1866, c. 49) authorizing such courts to examine and commit insane persons to the hospital are held valid, as merely regulating the exercise of the constitutional jurisdiction. State v. Wilcox, 24 Minn. 143.

^{*} See § 31, ante, note.

persons, and all gifts of their property or effects, made subsequent to the finding of an inquisition declaring their incompetence, are actually void.1 Hence there arises a special and exclusive jurisdiction of the court which is charged with the duty of providing for the payment of the debts of the idiot, lunatic, or drunkard, out of his estate, and of seeing that the legal and equitable rights of his creditors are protected and enforced.2 These rights are subject to the prior rights to maintenance of the subject and his immediate family.8 They are to be enforced according to the usual forms of proceedings in courts of equity, and wilful interference with them is punishable as a contempt of court. Thus it is a contempt to commence a suit at law against a lunatic, so found, without the permission of the court; or, after the commencement of lunacy proceedings, for any person, having actual notice thereof, to interfere with the property of the supposed lunatic. So it is held to be improper for any person to subject the estate of the lunatic to the expense of a proceeding by bill against his committee, without permission first obtained of the court.4

- § 35. As the Court of Chancery has, during the continuance of the lunacy, the whole control of the personal estate and choses in action of the lunatic, and can transfer the title to the same by directing a sale by the committee, so it may direct the committee to release any right of action in relation thereto as may be equitable and just. So where a matter
- ¹ The inquisition is *prima facie* evidence, merely, of the invalidity of the subject's acts done before the finding, but overreached by it. L'Amoureaux v. Crosby, 2 Paige, 422.
- "The English cases are not quite applicable upon this point. The custody of the lunatic is committed in England, not to the Court of Chancery, but to an individual selected by the crown, who is generally, but not always, the person who has the custody of the Great Seal. But here the charge of the person and estate of the lunatic and his maintenance is expressly committed to the Chancellor." Kent, C., in Brasher v. Van Cortlandt, 2 Johns. Ch. 242. Although one enter upon land as committee of a lunatic, it is held in New York that a subsequent sale of the land to another by such committee, and claim of title by the purchaser, absolutely changes the character of the possession and makes it adverse. Clapp v. Bromagham, 9 Cow. 530.

^{*} See ch. v. sec. ii., post.

⁴ L'Amoureaux v. Crosby, ubi supra.

relating to the lunatic's personal estate has been fairly litigated in court by the committee and decided against him, the court may, even although the lunatic was not made a formal party to the suit, protect the adverse party therein against a new suit by the lunatic or his representatives, by directing the committee to transfer to such adverse party the property which was the subject of litigation, or to release him from any further claim on account thereof.¹

§ 36. In North Carolina, in which state the Superior Courts and Probate Court have concurrent jurisdiction over the persons and estates of the insane,2 it is held, under a statute provision similar to that in New York,3 that the estate of a lunatic cannot be subjected to legal process, either for debts incurred for his support as a lunatic or subsisting prior to his lunacy, but that his estate is to be administered only by order of the court having lunacy jurisdiction.4 And when a court of equity directs a sale of the lunatic's property, no creditor of the lunatic can seize any portion of the property under an execution, the teste of which is subsequent to the date of the decree; the decree being substantially in rem, and subjecting the property to the control of the court. Any interference with such property is held ground for injunction, and the purchaser at a sale held under such an execution, before injunction obtained, will acquire no title as against the court. It is held further that

Gorham v. Gorham, 3 Barb. Ch. 24. The jurisdiction given to the court under 2 Rev. Sts. 54 et seq., in reference to the sale of real estate of lunatics, being a special statutory one, is to be exercised only as the statute directs; and the requirement that the petition "shall be referred" is material, and an omission so to refer is a fatal defect. But the purchaser under defective proceedings may move to have his title perfected by new or amended proceedings, or to have his purchase-money refunded. Valentine, in re, 72 N. Y. 184.

² Acts 1876-77, c. 241, § 6.
* Rev. Sts. c. 57, § 3.

⁴ Allison v. Campbell, 1 Dev. & Bat. Eq. 152. It is held that the jurisdiction to make such an order to provide for debts contracted before the lunacy rests with the Superior Court alone, and that the Probate Courts have no jurisdiction to provide for the payment of such debts, or to try the question of debt or no debt. Smith v. Pipkin, 77 N. C. 569; Blake v. Respass, id. 193; Adams v. Thomas, 81 N. C. 296.

⁵ Latham v. Wiswall, 2 Ired. Eq. 294.

an order for the payment of debts will never be made until a sufficiency for the support of the lunatic and his family, if minors, has been first ascertained and set apart. And where land of a lunatic was sold on his guardian's petition, it was held that the proceeds were under the direction of the court; so that no creditor could claim a priority in their disbursement until the lunatic's death, or the removal of his disability.

§ 37. In Pennsylvania any creditor of a lunatic may litigate his demand in a court of law, after proper notice given to the committee, and such a suit brought in good faith will be conclusive as to the amount and merit of the claim sought to be established. But the creditor, having obtained judgment, may not levy execution upon the lunatic's personal property in the hands of the committee, his sole remedy being by application to the court, which will order the committee to raise and pay over the funds necessary to satisfy the The statute provides that the debts of the judgment.8 lunatic shall be paid according to their character or nature, at the time of the inquisition finding lunacy; judgments or mortgages obtained during sanity, or before lunacy found, being liens and entitled to a preference, and all other debts attaching equally and having equal claims for payment.4

- ¹ Adams v. Thomas, 81 N. C. 296; Rev. Sts. c. 57, §§ 6, 7.
- ² Latham, ex parte, 6 Ired. Eq. 406.
- * Eckstein's Estate, 1 Clark, 224; s. c. 1 Pars. 59; Guthrie's Appeal, 16 Penn. St. 321; St. 1836, § 45.
- 4 Act June 13, 1836, §§ 20, 21; Wright's Appeal, 8 Penn. St. 57. Under the act the court may decree an allowance for the maintenance of the lunatic out of the proceeds of a sale of his real estate for the payment of debts. The amount of this allowance is not to be exceeded without an order of the court. Guthrie's Appeal, ubi supra. In Elwyn's Appeal, 67 Penn. St. 367, it was held that the half-pay of an officer of the United States navy not being subject to be taken by his creditors, but having reached the beneficiary, a lunatic, lost its distinctive character, and was to be administered as a distributable fund, of which the surplus might be applied by direction of the court to the payment of his debts, and, further, that in distribution of such a fund by the lunatic's committee it was not liable to the lawful exemption of \$300 as against his creditors.

Since the powers and duties of the lunatic's committee are considered in Pennsylvania as being exercised under the act of June 13, 1836, it is held that the committee of a lunatic widow cannot in that state, without the sanction of the court, elect for her not to take under her husband's

Upon similar views as to the authority of the Court of Chancery over insane persons and their estates, it was held in Virginia that the committee of a lunatic appointed by the Chancellor was a mere commissioner of the court, managing the estate and person of the lunatic, under the direction of the Chancellor, and was responsible to the court in like manner as a receiver, was removable in its discretion, and was not liable to be sued at law on claims either against the lunatic personally or his estate, although, if the committee were appointed by the concurrent authority with chancery, established by the statute, he might be so liable.¹

§ 38. In Kentucky, where the chancery jurisdiction over insane persons is considered to be of the same nature and extent as that originally exercised by the Lord Chancellor of England,2 it is held, in the absence of statute provisions on the subject, that the courts of chancery have no power to decree the sale of the lunatic's estates for the payment of his debts; and the court say, "By common law, equity has no jurisdiction to assess damages for a breach of covenant or for a tort, or even to establish a controverted debt, merely because one of the parties had become a lunatic." 8 So in Illinois, where similar views as to the nature and extent of the chancery jurisdiction obtain,4 it was held, there being no statute authorizing the allowance by the court of the claims of creditors of an insane person out of his estate in the hands of his conservator, that the allowance of such claims by the court was a nullity, and that a suit upon the conservator's bond to enforce payment of a claim so wrongfully allowed could not be maintained. The court added, that the creditor's proper remedy was by a suit at law against the conservator, as the lunatic's representative, upon which suit the lunatic's estate might be taken and sold upon execution.5

will, the statute giving the committee no authority in the matter. Kennedy v. Johnston, 65 Penn. St. 451.

- ¹ Bolling v. Turner, 6 Rand. 584.
- ² See § 30, ante.
- * Berry v. Rogers, 2 B. Mon. 308.
 4 See § 30, ante.
- Morgan v. Hoyt, 69 Ill. 489; Rev. Laws Ill. 1845, c. 50, § 5; Gross,
 p. 832, § 6. See chap. vi. sec. ii., (b).

SECTION III.

OVER NON-BESIDENT LUNATICS.

§ 39. It was said in an early case that one found a lunatic by a competent foreign jurisdiction might be considered as a lunatic in England; 1 but an inquisition of lunacy will not, in the absence of a statute making it effectual, be held sufficient to authorize a conveyance of the lunatic's lands situated without the jurisdiction in which the commission issues,2 since the guardian or committee appointed under such an inquisition is merely vested with the care of the person or property of the subject within the state where the commission is ex-And where a lunatic is seized of property in a foreign jurisdiction, a committee must be appointed in such foreign jurisdiction, in order to obtain control of the property.4 Thus where an inquisition had issued in Ireland, where the lunatic resided, and a chief part of his estates were situated in England, a transcript of the Irish inquisition was transmitted to the court in England which thereupon ordered a committee of the estates in England to be appointed.⁵ And so the court in the District of Columbia appointed a committee to take charge of property within the District belonging to a person found lunatic in Maryland.6 Upon an application of the general principle stated, it was held, where the committee of a legatee who had been adjudged a lunatic

¹ Gillam, ex parte, 2 Ves. 587.

² Duchess of Chandois, in re, 1 Sch. & Lef. 301; Perkins, in re, 2 Johns. Ch. 124; Neally, in re, 26 How. Pr. 402; Allison v. Campbell, 1 Dev. & Bat. Eq. 152.

⁸ Rogers v. McLean, 31 Barb. 304, s. c.

⁴ Pettit, in re, 2 Paige, 174; Ganse, in re, 9 Paige, 416. And in New York it is held that a petition for a commission of lunacy against a non-resident should show the alleged lunatic to be owner of property in that state, it not being sufficient to state that fact in affidavits annexed to petition. Fowler, in re, 2 Barb. Ch. 305.

Newport, in re, 2 My. & Cr. 42, note (a); Knox, in re, id.; Perkins, in re, ubi supra.

⁶ Burke v. Wheaton, 8 Cranch C. C. 341.

appointed the committee, sought to represent such legatee on the final accounting of the executor and to receive the legatee's share of the estate, that such committee could not intervene on the accounting, and had no standing in court by virtue of his foreign appointment.¹

- § 40. It is held that although a lunatic be seized of lands in one jurisdiction, yet, if he be resident in another, a committee of his person cannot be appointed in the former jurisdiction.² But a commission of lunacy may issue against an alien temporarily within the jurisdiction; and the domicile of the party against whom such a commission is applied for is not material to the question of jurisdiction, though it may be material to the question of discretion, if, for instance, the party has come into the country for a short time or for a particular purpose.³ Where one is found a lunatic, the appointment of
- Weller v. Suggett, 3 Redf. 249. Under the statute 3 & 4 Wm. IV. c. 65, §§ 34, 35, the Lord Chancellor of Great Britain has jurisdiction, as protector of the lunatic, to deal with the property of a party declared lunatic by a foreign jurisdiction; but this power is not to be exercised "except only in conformity with the laws of the country where the lunacy has been declared," and the authority of the foreign jurisdiction in the premises must be shown affirmatively. Newton v. Manning, 1 Mac. & G. 362. See Graydon, in re, id. 655.
- ² B., in re, 1 Ir. Eq. 181. But see Oliver v. Oliver, 3 Irish Law Recorder, N. s. 14, in which case a commission of lunacy was ordered to issue against an insane person unlawfully restrained in Austria by one having an undue influence over him.
- * Bariatinski, in re, Phillips, 375. And see Houstoun, in re, 1 Russ. Ch. 312; Colah, in re, 3 Daly, 529. So in Pennsylvania the word "resident," as applied to lunatics by the statute of June 3, 1836, § 17, is construed to mean one who is dwelling for the time within the state. Rosenberg, in re, 1 Leg. Gaz. Rep. 49. Where a lunatic had left his residence while in a condition of mental aberration, leaving personal property there, and had departed to parts unknown, it was held, that, for the purposes of an application for a commission of lunacy, he must be considered as still being a citizen of the state where he was domiciled at the time he was deprived of his reason. Ganse, in re, 9 Paige, 416. In a case where letters rogatory of a Portuguese court asked an inquiry into the sanity of a Portuguese who had become lunatic in London, it was held that the power to institute such an inquiry existed, notwithstanding sec. 3 of the Lunacy Act (25 & 26 Vict. c. 86), but that it should be limited to the party's present condition without ascertaining when the lunacy commenced, out

his committee rests with the court appointing the inquisition, although the property of the lunatic is situated in another jurisdiction. Upon the same principle which empowers the Court of Chancery, in a proper case, to order a maintenance for an infant whose person is out of its jurisdiction, it is held that the court may make an allowance out of the property within its control belonging to an insane person residing, and having a duly appointed guardian, in another state, to be paid to such foreign guardian for the maintenance of his ward.²

SECTION IV.

OVER DRUNKARDS.

§ 41. In New York the statute confides the care and custody of the estates of habitual drunkards, as well as of lunatics and idiots, without restriction or limitation, to the Court of Chancery.⁸ And the court has the custody and control of the persons as well as of the estates of habitual drunkards, and may exercise that control through a committee as in the case of lunatics.4 The proceeding in such cases is by writ de lunatico inquirendo, under which it is competent for the jury to find that the party is incapable of conducting his affairs on account of habitual drunkenness.⁵ Upon such proceedings had, the fact of habitual drunkenness being proved, it is unnecessary for the prosecutor to prove affirmatively that an habitual drunkard is incapable of managing his affairs. On the contrary, the fact that a person is for any considerable part of his time intoxicated to such a degree as to deprive him of his ordinary reasoning faculties, is prima

of respect to rights of third parties, who could not defend their interests upon such an inquiry. Sottomaior, in re, L. R. 9 Ch. Ap. 677.

- ¹ Tottenham, in re, 2 Myl. & C. 89.
- ² McNeely v. Jamison, 2 Jones Eq. (N. C.) 186. The same authority has been exercised in England as a chancery prerogative, in the case of an infant lunatic resident abroad. Volans v. Carr, 2 De G. & Sm. 248.
 - * Tracy, in re, 1 Paige, 580; 1 Rev. Sts. (2d ed.) c. 5, tit. 2, § 1.
 - ⁴ Lynch, in re, 5 Paige, 120.
 - See Tracy, in re, ubi supra.

facie evidence, at least, that he is incapacitated to have the control and management of his property. A similar authority over the personal estates of habitual drunkards is vested by statute in the courts of Pennsylvania, New Jersey, Maryland, and Illinois.

§ 42. It may be said generally that an inquisition in the case of an habitual drunkard devolves upon his trustees or committee the same powers, duties, and responsibilities which attach to the office of committee of a lunatic.6 Thus the committee of an habitual drunkard has the right, subject only to the superintending control of the court, to decide as to the proper residence of the drunkard; and he is responsible for the consequences of his neglect to take proper care of the person of such drunkard. And it is the duty of the court to aid and protect the committee in the proper exercise of this right, and to give him directions on the subject, when necessary.7 So if the committee of an habitual drunkard finds that any person is furnishing the drunkard with the means of intoxication, he should apply to the court for protection against such an interference with his duties as committee.⁸ So where a third person, without the consent and

¹ Ibid. In Pennsylvania it has been held, upon a traverse to an inquisition on an habitual drunkard, to be ground for setting aside the finding that the habitual drunkard was still able to take care of his estate. And the court refused to charge that "unless defendant is of unsound mind, the fifth section of article 6 of the constitution prohibits finding him an habitual drunkard." Commonwealth v. McGinnis, 3 Pitts. 445.

- ² Act June 13, 1836. See Purdon's Dig. 579, § 1.
- 8 Act March 3, 1853. See Nixon's Dig. 254.
- 4 Rev. Code Maryland, art. 53, § 13.
- ⁵ Rev. Sts. c. 86, § 1.
- ⁶ Steel v. Young, 4 Watts, 459; Leckey v. Cunningham, 56 Penn. St. 370. And see Bixler v. Gilleland, 4 Penn. St. 156.
 - ⁷ Lynch, in re, 5 Paige, 120.
- 8 Heller, in re, 3 Paige, 199. In this case, Walworth, C., said: "In this particular case it is understood the idiot is perfectly harmless and peaceable except when under the influence of liquor; but that when intoxicated he frequently destroys the property of others. I therefore shall direct an order to be entered restraining all persons from selling or furnishing him with any ardent spirits, or with the means of obtaining it, without the express sanction of the committee. And if any one after

against the wishes of the committee, has the custody of or harbors the habitual drunkard, the committee should apply to the court, ex parte, for an order that such person deliver the drunkard up to the committee, or cease from harboring him; and if such order is disobeyed, the party will be punished as for a contempt of court.¹

SECTION V.

ON THE COLLATERAL ISSUE OF INSANITY.

§ 43. It is incident to the ordinary jurisdiction of a court having full chancery powers to inform its conscience by directing an issue upon the sanity of a party not found a lunatic to be framed for a jury when the question arises collaterally in an equitable proceeding, as, for instance, when it becomes necessary to determine the question of the sanity of the grantor in a deed upon a bill brought to set aside his conveyance upon the ground of his insanity.2 But the court will not ordinarily direct such an issue without some evidence of the insanity of the party appearing, the natural presumption being in favor of sanity.8 And the court may determine the question of sanity, when raised collaterally before it, without directing an issue to inform its conscience in the matter.4 The finding of the court or jury upon such a special issue is only conclusive upon the matter in dispute, and the court has no power to direct an issue as to the insanity of a party at particular dates, upon an ex parte petition brought for the purpose of determining that question merely.5

notice of the order shall be guilty of a violation thereof, he will be held responsible, not only for the contempt of the court, but for all the damages which may be done by the idiot to the property of individuals while under the influence of the liquor thus furnished to him. The committee is also directed to serve a copy of the order upon such retailers in his neighborhood as he may think proper, so that they may not hereafter plead ignorance thereof."

- 1 Lynch, in re, ubi supra.
- ² Evans v. Blood, 3 Bro. Parl. Ca. 632.
- * Long v. Long, 4 Ir. Ch. 106; Harrod v. Harrod, 1 Kay & Johns. 4.
- ⁴ Alexander v. Alexander, 5 Ala. 517.
- Whitlock v. Smith, 13 Fla. 385. In this case the court say: "Two

SECTION VI.

INTERLOCUTORY JURISDICTION IN LUNACY.

§ 44. In the exercise of its function as protector of the person and estate of a lunatic, so found, the courts of chancery will make any orders necessary to restrain waste of the estate without a bill being filed, upon petition by the lunatic's committee, and will enforce obedience of such orders by proper process.1 The lunatic's estate having been expended in his necessary maintenance, the court, upon the petition of the committee and after a reference to a master, ordered the lunatic to be delivered over to the overseers of the poor of the town where he had his settlement.² The court has no authority to divest an insane person of any legal right to or interest in property, without the consideration of benefit to such person, by the exercise of a discretion which could be exercised only by the lunatic himself, if of sound mind. Thus it was held that the Chancellor had no power to divest an insane widow of her legal rights in her husband's estate by electing for her to take a provision made for her in his will, in lieu of dower, it being manifest that the provision was not intended to be in lieu of dower.8

methods only of investigating such a question are known to chancery practice. One, when the question arises collaterally in a cause pending, when an issue may be directed to a court of law to try it; the other is when a commission de lunatico inquirendo is awarded upon an ex parte petition of a friend of the alleged lunatic.' In Yourie v. Nelson, 1 Tenn. Ch. 275, it was held that, pending a bill by the guardian of a lunatic to set aside conveyances on the ground of the grantor's insanity, the court might at any stage of the case, even after argument, on application of a party to the suit, order a writ of inquisition to issue to ascertain whether grantor was still of unsound mind.

- ¹ Chinnery, in re, 1 Jones & La T. 90; Hallock, in re, 7 Johns. Ch. 24.
 - ² M'Farlan, in re, 2 Johns. Ch. 440.
- 8 Newcombe v. Newcombe, 13 Bush, 544. It is held in South Carolina that the statute right of a widow to elect to avoid her husband's bequests to illegitimate children may, in case of her insanity, be exercised by her committee acting under the control and direction of the court. Taylor v. McRa, 4 Rich. Eq. 96.

(a.) Notice of Interlocutory Proceedings.

§ 45. In proceedings had in the probate courts for the sale of the property of an insane person, whether to provide for his maintenance or for the payment of his debts, the statutes ordinarily provide for proper notice of the institution of the proceedings to parties in interest. It is apprehended, where the statute does not provide for such notice, or where the proceedings are had under the general authority of chancery to deal with the concerns of lunatics, that proper notice must be given to the heirs-at-law and next of kin of the lunatic. In England, where the parties interested in the succession are unknown, petitions in lunacy are to be served upon the Attorney General.¹

(b.) Costs in Interlocutory Proceedings.

§ 46. In interlocutory proceedings had in lunacy matters, the allowance of costs is regulated in the equitable discretion of the court. Where such proceedings are for the benefit of the lunatic, the costs will ordinarily be ordered to be paid out of his estate. And the court may adopt the same principle in allowing the costs of collateral proceedings ordered for the lunatic's benefit. Thus where it became an expedient to frame an issue for a jury upon the validity of a will, a lunatic in charge of the court being the heir-at-law of the supposed testator and the issue being found against the will, it was held that although the trustees named in the will were not entitled to costs under the decree pronouncing against its validity, yet the court might allow them costs, upon their petition, out of the lunatic's estate.²

Bourke, in re, 2 De G. J. & S. 426. It was held in Watson, ex parte, Jac. Ch. 161, that petitions in the matter of one found an idiot must be served on the Attorney General; and Lord Eldon said it seemed that the rule was different in cases of lunacy. He added that the crown would not take advantage of the rule, but that, in order to keep the practice uniform, it should be adhered to.

² Turnley, in re, 12 Ir. Eq. 581.

SECTION VII.

INHERENT CHANCERY JURISDICTION OVER INSANE PERSONS.

(a.) In General.

§ 47. It has already been stated that the lunacy jurisdiction exercised by the English Court of Chancery is derived from the authority of the King's warrant under his sign-manual, and, further, that the fact of lunacy being, under this authority, determined and a proper custodian of the insane person and his estates appointed, the superintendence of the trust as administered by the custodian is a part of the general jurisdiction of the Great Seal, that is, of the Court of Chancery. But it appears that the court under certain circumstances, even before its authority in this direction was confirmed by statute, interfered for the protection of the property, and in some cases of the persons, of lunatics,² although the proper lunacy jurisdiction of the court had not been previously invoked for the determination of the party's sanity. The power of the court to exercise such a jurisdiction would seem to rest upon the consideration that "the Court of Chancery may properly be deemed to have had originally, as being the general delegate of the authority of the crown as parens patriæ, the right, not only to have the custody and protection of infants, but also of idiots and lunatics, when they have no other guardian." The rule on this subject may be safely stated to be, that although the court cannot dispose of the person or estate of an insane citizen without the fact of his insanity having been determined by inquisition or other proceedings had for the purpose, yet under proper circumstances the court may extend its protection to the estate of the insane person without previous inquest.4 This jurisdiction was originally

¹ See §§ 28, 29, ante.

² But see § 49, post.

^{*} Story, Eq. Jur. § 1362.

⁴ Rebecca Owing's Case, 1 Bland's Ch. 290. In this case it was held that where the estate of a third person was charged with an annual sum for the support of a lunatic, the court might enforce the payment of such sum as against the person or personal property of the legal owner of the estate, or by putting the estate into the hands of a receiver. Where, in a

assumed with some reluctance. Thus upon a petition praying a reference to a master as to the state of the insane party and her fortune, and for directions for her maintenance, the property being too small to bear the expense of a commission of lunacy, Lord Loughborough was afraid of establishing a precedent, but finally said that he was doing an irregular thing, and might as well do it completely, and so made the order prayed for, directing the petitioner to come into court from time to time for directions.1 And in a later case Lord Lyndhurst, notwithstanding the precedents cited, refused to give directions touching the property of a lunatic, no commission having issued, although the property was very small.2 The jurisdiction appears to have been confined to cases in which the amount of the lunatic's property was so small that the estate would be exhausted or crippled by the expense of lunacy proceedings.3

proceeding in equity, decrees manifestly erroneous and prejudicial to the rights of an imbecile party had been entered, but not enrolled, the court set aside the decrees upon a rehearing. Knox v. Waters, 10 Ir. Eq. 353. In Indiana it is held that under the authority of the act of March 11, 1861 (1 R. S. 1876, p. 555), a married woman whose husband is insane, but whose insanity has not been judicially determined, may make a valid conveyance of her separate real property. Shin v. Bosert, 72 Ind. 105. But in England the rule would appear to be that the Court of Chancery will not authorize such a conveyance, whether the fact of lunacy has been determined or not, without some explanation as to the nature of the lunatic's property, and whether it contributes to the wife's support, and whether there was a marriage settlement. See Cloud, in re, 15 C. B. N. s. 833.

- ¹ Eyre v. Wake, 4 Ves. 795.
- ² Ridgway, ex parte, 5 Russ. Ch. 152. And see Machin v. Salkeld, Dickens, 634; B., in re, 1 Ir. Eq. 181.
- * Picard, ex parte, 3 Ves. & Bea. 129; Radcliffe, ex parte, 1 Jac. & W. 639; Machin v. Salkeld, 2 Dick. 634; Eyre v. Wake, 4 Ves. 795; Farrow, ex parte, 1 Russ. & Myl. 112; Lacy, ex parte, 1 Coll. Lun. 196; Bird v. Lefevre, 4 Bro. C. C. 100; Carr v. Boyce, 13 Ir, Eq. 102; Coleman's Trusts, in re, 1 Ir. Rep. Eq. 292. In Canada, where the estate of a person who has been found a lunatic is of small amount, the court will combine in one reference to the master all the usual inquiries, although the several objects are in England the subjects of distinct and separate references. Duggan, in re, 2 Grant's Ch. 622. The question whether the jurisdiction should be exercised would appear to have been for the consideration of the court in the view of the circumstances of each particular case, and the right of a party to invoke the jurisdiction does not

§ 48. This jurisdiction has been exercised in favor of the relatives or dependents of the insane person. Thus where a sum in stock was bequeathed to a married woman whose husband was of unsound mind, though no commission of lunacy had issued against him, the court, on bill filed by the husband and wife for payment of the legacy, transferred the fund into court to the joint account of the plaintiffs, and afterwards, in consideration of the poverty of the parties, made an order on the petition of the wife that the dividends should be paid her for her life.2 So where a wife was entitled to an equitable allowance out of the separate estate of her husband, who was a lunatic, but of whose person and estate no committee had been appointed, the court ordered her separate property to be transferred to the assistant registrar, and the income thereof to be paid her upon her separate receipt, until the further order of the court.8 And where a wife prayed for allowance for support of herself and her family from an annuity bequeathed to her lunatic husband, it was ordered that commission be applied for, and meanwhile that suitable allowance be made for the wife.4 Where

appear to have been admitted, even since the St. 25 & 26 Vict. c. 86 (see § 53, post). Thus in Gilbee v. Gilbee, 1 Phillips, 121, it appeared that the property of a lunatic, not found such by inquisition, consisted of £4,252 annuities, and £906 cash standing to his account in a cause to which he was a party, and a £7 freehold. A petition presented in the cause for application of the income to maintenance of the lunatic with a view to save the expense of a commission was dismissed, the Chancellor saying, that when the court had to provide not simply for a temporary occasion, but for the permanent care and management of a lunatic and his property, it was inconvenient to deviate from the regular practice; and that, looking at the amount of property in this case, the expense of a commission afforded no ground for the application. But in another case an order was made for the application of the income of a fund in court for the maintenance of a person of unsound mind without a commission, though his property produced upwards of £200 per annum. Burke, in re, 2 De G. F. & J. 124. And see Irby, in re, 17 Beav. 334.

- ¹ Conduit v. Soane, 5 Myl. & C. 111. In this case an annuity of £100 was directed to be paid to the wife and son of a supposed lunatic without reference to a master, the property being small.
 - ² Steed v. Calley, 2 Myl. & K. 52.
 - * Carter v. Carter, 1 Paige, 493.
 - 4 Exeter v. Ward, 2 Myl. & K. 54. Where J. S., a person alleged to

the next of kin of a deceased lunatic was of unsound mind, though not so found by an inquisition, a transfer of the lunatic's personal estate was directed to be made to the person to whom administration durante animi vitio of such next of kin had been granted, agreeably to the practice of the Ecclesiastical Court. But ordinarily an order cannot be made in chancery for the maintenance of a lunatic not found so by inquisition, or of his family or dependents, unless proceedings have been taken for placing the property under the administration of the court.²

£720, which had been paid into court under the Trustee Relief Act, the father of J. S. presented a petition in his own right, and as her next friend, praying that the income of the fund might be paid to him during the life of J. S., or until further order, he undertaking to apply it to the maintenance of J. S. Evidence showed that J. S. was quite imbecile, and was not entitled to any property other than the £720, and that the father was not of ability to maintain her. The court made the order, but directed an application once a year in chambers showing the then state of J. S., and of what her property then consisted. Sturges's Trusts, in re, 5 Jur. N. s. 423. See also Nettleship v. Nettleship, 10 Sim. 236; Williams v. Allen, 33 Beav. 241; and cases cited infra.

- Dr. Lushington, as follows: "It is the practice of the Ecclesiastical Court to grant administration for the use and benefit of a lunatic, though the person alleged to be so has not been found a lunatic by inquisition. When such a case occurs, the Ecclesiastical Court requires affidavits stating the fact of lunacy, and that no inquisition has been had, and of course no committee appointed. The court then grants administration to the next of kin of the lunatic, for the use and benefit of the lunatic pending the lunacy; and it requires sureties in double the amount of the property, and such sureties must justify." See Crump, in re, 3 Phill. 497; Hinckley, in re, 1 Hagg. 477.
- Tayler, in re, 2 De G. F. & J. 125. In Berry, in re, 13 Beav. 455, the question was raised whether jurisdiction over the property of insane persons not so found by inquisition could be exercised in the Vice-Chancellor's court. This question was decided affirmatively in Davies v. Davies, 2 De G. M. & G. 50. But in Irby, in re, 17 Beav. 334, where the income exceeded £50 (see Lunacy Regulation Act, 25 & 26 Vict. c. 86, as cited post, § 53), the Master of the Rolls held that the exercise of the jurisdiction was vested exclusively in the Lord Chancellor sitting in lunacy. In a later case, however (Macfarlane, in re, 2 Johns. & H. 673), the same court entertained jurisdiction in a similar case, and declined to follow the authority of Irby, in re. The court said: "Applications relating to the

§ 49. The jurisdiction over the estates of insane persons not so found by inquisition, whether it be considered as an inherent chancery power, or as vested by the Lunacy Regulation Acts in the Chancellor sitting in lunacy, is settled by the modern cases to extend only to the maintenance of the lunatic and the supervision of his estate; for although in one case the Master of the Rolls appears to have considered that the jurisdiction might be extended to the appointment of a guardian for the person of the lunatic, his expression of opinion was unnecessary to the decision of the case in which it occurred, and has been subsequently overruled or explained.2 But it is held that a proper person may be appointed " to act in the nature of a guardian" of an insane person.8 And where one of unsound mind, not so found, petitioned for payment of a fund in court and the appointment of a guardian, the fund was ordered to be paid to the person proposed as guardian, he undertaking to apply it for the maintenance, comfort, and support of the petitioner.4 And the principle of the rule stated does not apply to those cases in which it appears to be necessary to appoint a person to perform some specific act which is required or decreed to be done by the lunatic, or to protect his interests in the courts of law. Thus where land had been sold by warrant of a decree in chancery for the payment of charges which had subsisted prior to the commencement of the estate of one of the defendants who was of unsound mind, though not so found by inquisition,

property of lunatics not so found by inquisition, which is in or under the administration of the Court of Chancery, are entertainable by this court in its ordinary jurisdiction." In Stables, in re, 4 De G. J. & S. 257, the court, considering that the Lunacy Regulation Acts contained no provision for the conveyance of the legal estate of insane married women, made an order directing such a sale, and declaring the beneficial interest of the lunatic bound by the order.

- ¹ Vane v. Vane, L. R. 2 Ch. D. 124.
- ² Bligh, in re, L. R. 12 Ch. D. 364; Brandon's Trusts, in re, L. R. 13 Ch. D. 773. But where proper proceedings had already been instituted for the appointment of a commission, and the alleged lunatic had been removed from the jurisdiction, the court ordered that he should be brought back to England. Wykeham, in re, Turn. & R. 587.
 - ⁸ Vane v. Vane, ubi supra.
 - 4 Brandon's Trusts, in re, ubi supra.

to the purchaser in place of the lunatic.¹ And where a defendant, after decree entered in chancery, became impaired in mind, the court appointed a guardian for him, by whom he might do the things required by the terms of the decree.² And the power of the court, upon an ex parte application, properly supported, to appoint a guardian ad litem for a party in fact insane, though not so found by inquisition, is often exercised by the Court of Chancery.⁸

§ 50. Although when a person in fact insane, although not so found by inquisition, is restrained of his liberty unjustly and without authority of law, his remedy is ordinarily to be sought by habeas corpus, or other appropriate remedy issuing from a court of law; 4 yet it seems that a court of equity, when it appears that the estate or property of such a person is in danger of waste or misappropriation by others, may, by a summary order, interfere to protect the person of the lunatic, with a view to having the question of his insanity judicially determined. Thus where such a lunatic was entitled to a jointure of £1,000 per year out of her husband's Scotch estates, and it appeared that her husband's nearest relative was carrying her to Scotland, the court, on application, sent a messenger and stopped her at St. Albans, and ordered a commission of lunacy to issue.

(b.) Under the Trustee Acts.

§ 51. The authority of the Court of Chancery to compel the conveyance of estates held in trust by insane trustees and executors, whether found insane by inquisition or not, to persons having the beneficial interest in such estates, or to new trustees, is established in England by a series of statutory enactments,⁶ the latest of which are the Trustee Acts of 1850,

- ¹ Blake, in re, 3 Jones & La T. 265.
- ² Gason v. Garnier, Dickens, 286.
- ⁸ Obaldiston v. Crowther, 1 Sm. & G. app. xii; Charlton v. West, 3 De G. F. & J. 156; 1 Dan. Ch. Pr. 177, 476; and see ch. vi. sec. ii., (d).
 - 4 See § 22, ante.
 - ⁵ Lady Marr's Case, Ambl. 82; and see Wenman's Case, 1 P. Wms. 702.
- For a collation of the earlier statutory enactments upon this subject, see Shelf. Lun. ch. 8, § 3. Under the statute 11 Geo. IV. and

1852.¹ The earlier statutes regulating this subject have been regarded as possibly subversive of the principle that the existence of insanity is a fact which, under the law of England, is not to be decided without the intervention of a jury;² but it is to be considered that the issue of insanity in such cases is, strictly speaking, merely collateral, and that the result of the investigation cannot be to restrain the party of his personal liberty or to divest him of any beneficial interests in property.³ It is now provided in the interpretation clause

1 Wm. IV. c. 60, it was held that the Vice-Chancellor had no jurisdiction in cases of insane trustees or mortgagees, in the first instance, beyond directing a reference to a master. Anonymous, 5 Sim. 322. See Sandford, in re, 1 Mac. & G. 538. It was held that before the St. 6 Geo. IV. c. 74, § 4, a trustee, although found a lunatic by the master's report, could not be ordered to convey his estate unless a commission had issued. Gillam, ex parte, 2 Ves. 587. But in Simms v. Naylor, 4 Ves. 360, stock was ordered to be transferred under St. 36 Geo. III. c. 90, the trustee being of unsound mind, although no commission had issued and the trustee refused to transfer, such refusal proceeding from mental weakness. For a case of such a transfer made by vesting order under the Trustee Act of 1850, §§ 5, 24, see White, in re, L. R. 5 Ch. App. 698.

- ¹ 13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55.
- ² Shelf. Lun. 35, note (a).
- * Under the Trustee Acts of 1850, 1852, there has been some discussion of the question whether the jurisdiction conferred by the acts is to be exercised in lunacy or in chancery. In a case in which a testator devised real estate to trustees, their heirs and assigns, upon certain trusts, the surviving trustee devised all estates vested in him as a trustee to three persons, one of whom, after proving his testator's will, became of unsound mind. A petition was presented for the appointment of new trustees, and for the appointment of a person to convey on behalf of the devisees of the surviving trustee. Under these circumstances, it was held that the petition was properly presented in lunacy as well as in chancery. Mason, in re, L. R. 10 Ch. 273. In another case it was held that a petition for the appointment of new trustees in the place of trustees two of whom were dead and one of the survivors a person of unsound mind not so found by inquisition, but not asking for a vesting order, might be presented in chancery and not in lunacy. The court intimated an opinion that the rule would be otherwise when a vesting order is asked, since the jurisdiction to appoint trustees is in chancery, but to divest the lunatic's property, in lunacy. Vicker's Trusts, in re, L. R. 3 Ch. D. 112. And in Pearson, in re, L. R. 5 Ch. D. 982, it was held that where one of several trustees is a lunatic, and it is desired to appoint a new trustee in his place, the petition must be entitled in the chancery division as well as in lunacy,

of the Trustee Act of 1850 that "the word 'lunatic' shall mean any person who shall have been found to be a lunatic upon a commission of inquiry in the nature of a writ de lunatico inquirendo," and that "the expression 'person of unsound mind' shall mean any person not an infant who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs."

since otherwise the vesting order would sever the joint tenancy. And see Lamotte, in re, L. R. 4 Ch. D. 325; Currie, in re, L. R. 10 Ch. D. 93; and, contra, Ormerod, in re, 3 De G. & J. 249. But when the trustee alleged to be insane is without the jurisdiction of the court, the petition need not be entitled in lunacy as well as in chancery, since under sec. 9 of the act 13 & 14 Vict. c. 60, when the trustee is out of the jurisdiction the Court of Chancery may make a vesting order. Gardner's Trusts, in re, L. R. 10 Ch. D. 29. See also, upon the general subject of jurisdiction, Owen, in re, L. R. 4 Ch. App. 782; Sparrow, in re, L. R. 5 Ch. App. 662; Donisthorpe, in re, L. R. 10 Ch. App. 55. It has been held that a new trustee must be appointed before a vesting order will be made. Nash, in re, L. R. 16 Ch. D. 503. But see Watson, in re, 19 Ch. D. 384. When the lunatic trustee has been so found by inquisition, a new trustee will not be appointed in the absence of the committee of the insane trustee. Parker's Trusts, in re, 32 Beav. 580. As to the payment of costs upon an order vesting the estate of a lunatic mortgagee under the Trustee Act, see Wheeler, in re, 1 De G. M. & G. 434; Phillips, in re, L. R. 4 Ch. App. 629; Viall, in re, L. R. 8 Ch. App. 439; Amedee, in re, 4 De G. & J. 317; Shelf. Lun. (2d ed.) 510. Notice of a petition for an order vesting in new trustees property of which a trustee has become lunatic should be served on his committee. Saumarez, in re, 8 De G. M. & G. 390. But such notice need not be served on a lunatic trustee not so found by inquisition. Green, in re, L. R. 10 Ch. App. 272.

The Trustee Act of 1850 did not give to the English courts, whether sitting in chancery or lunacy, jurisdiction to dispose, by a vesting order, of lands in Ireland. Davies, in re, 3 Mac. & G. 278; Smith's Trusts, in re, 4 Ir. Rep. Eq. 180. And the Irish Lunacy Regulation Act, 34 Vict. c. 22, § 8, did not include in its operation the case of a joint power which might be exercised by a lunatic along with another person. Kilworth, in re, 11 Ir. Rep. Eq. 612. In Webb v. Cashel, 11 Ir. Eq. 558, a receiver being insane, the court made an order that his surviving surety might pass the account, and that the balance being lodged in court, the recognizance might be vacated. For further cases bearing upon the construction and application of the Trustee Acts, see Tutin, ex parte, 3 Ves. & Bea. 149; Ward, in re, 2 Mac. & G. 73; Bradshaw, in re, 2 De G. M. & G. 900; Wood, in re, 3 De G. F. & J. 125; Molyneux, in re, 4 De G. F. & J. 365; Mason v. Mason, L. R. 7 Ch. D. 707; Holland, in re, L. R. 16 Ch. D. 672; Needham, in re, 6 Ir. Eq. 557.

§ 52. In New York it is considered that while the common law has made no provision for the execution of a joint trust by one trustee where the co-trustee, by reason of lunacy or other inability, has become incompetent, yet in such cases it is proper for the Court of Chancery to interfere to remove the lunatic trustee, under its statute powers, so that the trusts may be executed by the remaining trustee alone, or with another appointed by the court. It is further held that a lunatic trustee who is also an executor may be removed from his office of trustee of a special trust not connected with his executorship, without interfering with a trust conferred on him as executor; 2 and generally, in the United States, it is apprehended that courts having full chancery powers may assume the authority to remove insane trustees and appoint others in their place. And in those jurisdictions where the custody of insane persons and their estates is committed to the courts of probate, a like power is ordinarily exercised as being one of the ordinary functions of a court of probate jurisdiction.

(c.) Under the Lunacy Regulation Acts.

§ 53. By the Lunacy Regulation Act, 25 & 26 Vict. c. 86, the Lord Chancellor was authorized to appoint persons to recover and receive funds of a lunatic, without inquisition and in a summary manner, in the alternative either of his income being under £50 or of his property not exceeding £1,000 in value. Under this statute it was held that a bill in equity could not be filed by the next friend of an insane person not so found by inquisition for dealing with his estate, but that the proper course was to present a petition under the act; and under a similar provision in the Irish Lunacy Regulation

¹ See § 31, ante, and note.

² Wadsworth, in re, 2 Barb. Ch. 381.

In ascertaining whether the property of the insane person is of the amount of £1,000 or less, so as to bring the case within the statute, his debts, and the expenses incurred in his past maintenance since he became of unsound mind, are to be deducted from the gross amount of his property. Faircloth, in re, L. R. 13 Ch. D. 307.

⁴ Halfhide v. Robinson, L. R. 9 Ch. App. 373.

Act of 1871, 33 & 34 Vict. c. 22, it was held that the court, in chancery, would not, save in exceptional cases, exercise the jurisdiction theretofore acted on, of providing for the maintenance of a person of weak mind, not found a lunatic, from the funds of such person under the control of the court, where the income is within the limits prescribed by sec. 68 of that act, and that application would be more properly made to the Lord Chancellor sitting in lunacy. So, in another case, the Master of the Rolls expressed himself as satisfied that chancery has original jurisdiction to give directions as to the maintenance of insane persons not so found by inquisition, but that such jurisdiction would not be exercised unless the property is small, and proceedings are not intended to be taken in lunacy.2 The jurisdiction, however it arises, to deal with the estate of an insane person not so found by inquisition will be taken to cease with the death of the lunatic. Thus where a lunatic, not so found, died seized of a small freehold estate, but not possessed of personal property, and his step-father had received the rents of the estate and expended more than the amount of them in maintaining the lunatic, and had also paid the lunatic's funeral expenses, it was held that the step-father was not entitled, under St. 3 & 4 Wm. IV. c. 104, to be paid either the surplus expenditure or the funeral expenses out of the lunatic's freehold.8

¹ Knipe's Trusts, 6 Ir. Rep. Eq. 182. But where the legal estate in lands sold under the order of the court was vested in an insane trustee, though not so found by inquisition, an order may properly be made on a petition in chancery, under the Trustee Acts of 1852 (see § 51), appointing a person to convey the legal estate so vested. Herring v. Clark, L. R. 4 Ch. App. 167.

The jurisdiction established by the Lunacy Regulation Act has been exercised in the appointment of two persons to receive from trustees and apply for his benefit the property of a prisoner acquitted on the ground of lunacy. Harvey v. Trenchard, 34 Beav. 240.

² Vane v. Vane, L. R. 2 Ch. D. 124; Bligh, in re, L. R. 12 Ch. D. 364; Brandon's Trusts, in re, L. R. 13 Ch. D. 778.

^{*} Carter v. Beard, 10 Sim. 7.

CHAPTER III.

PROCEEDINGS ON THE INQUISITION OF INSANITY.

SECTION I.

OF NOTICE AND PLACE.

§ 54. Formerly, under the English practice in lunacy cases, notice was not given of the execution of the commission to the party alleged insane, the proceedings being ex parte and not conclusive, and the party having in all cases the right to traverse them. But if there appeared to be good reason therefor, in any case, upon proper application to the court, an order of notice might issue.2 And where a motion was made, under a colonial statute, to the Court of Chancery, to declare a person a lunatic without a commission, and to apply his estate to his maintenance in a lunatic asylum, it was held that notice of the motion should be served on the lunatic personally, if it were practicable to do so without danger to his mental or bodily health; and it was directed that some medical man, other than the physician of the asylum where the supposed lunatic was then confined, should examine into his condition in order to ascertain whether service of the notice could safely be effected upon him,8 the affidavit of an officer of the asylum having been held insufficient in a similar case.4 Under the modern practice in lunacy the alleged lunatic is entitled to notice of the presen-

¹ See § 71, post.

² Shelf. Lun. 101; Rex v. Daly, 1 Ves. 269. And the Chancellor was inclined to quash an inquisition, such an order of notice not having been complied with, and it further appearing that the commission was not executed near the place of abode of the supposed lunatic. Hall, ex parte, 7 Ves. 261.

^{*} Mein, in re, 2 Chan. Chamb. Rep. (Canada) 429; and see Miller, in re, 1 id. 215.

⁴ Newman, in re, 2 Chan. Chamb. Rep. (Canada) 390.

tation of the petition for a commission, and the Chancellor, before proceeding to issue the commission, must be satisfied that such notice has been duly given. If the alleged lunatic is without the jurisdiction of the court, no notice is required.¹

§ 55. In the United States it is generally held that the party alleged to be insane has the right to have notice of, and to be present at, the proceedings instituted for determining the issue of sanity, even although such proceedings be by inquisition in chancery, which the party has afterwards the right to traverse; ² and although in cases of confirmed and dangerous madness, or when the party cannot, with safety to himself or others, be present at the execution of the commission, notice may be unnecessary, it would seem that in such cases an order of court should be obtained dispensing with it. ³ So where proceedings were conducted under statute regulations which did not provide, in terms, for notice to the person alleged to be insane, the court held that it could never have been intended by the legislature "that so important a proceeding as that of declaring a party

¹ See General Orders in Lunacy, Nov. 7, 1853. Pope, Lun. 54, 55.

² Tracy, in re, 1 Paige, 580; Russell, in re, 1 Barb. Ch. 38; Whitenack, in re, 2 Green Ch. 252. But see Child, in re, 1 C. E. Green, 498. And in South Carolina the court, following the English precedents, held it not necessary that the alleged lunatic should have notice of the inquisition. Medlock v. Cogburn, 1 Rich. Eq. 477. But it is to be noticed that the courts of that state also adopt the English rule that the alleged lunatic has always the right to traverse the inquisition. Ibid. See § 71, post. Substantially the same rules appear to obtain in Pennsylvania, the commissioner and jury not being required to examine the party, although it is held that, when practicable, the jury should see him and, if possible, hear his conversation, and that he should be permitted to be present and to have all the rights of a defendant. Lincoln, in re, 1 Brews. 392. In Kentucky the statute (Rev. Sts. c. 48, § 6) provides that all inquisitions shall be made in open court, and that the idiot or lunatic shall be brought into court for the inspection and examination of the jurors, unless it appear by affidavit that he cannot be controlled, or that ill health forbids See McAfee v. Commonwealth, 3 B. Mon. 305. And, applying the maxim omnia acta, rite acta, it is held that when the lunatic is so brought into court and trial had, the necessity for either notice or writ is dispensed with. Lackey v. Lackey, 8 B. Mon. 107.

^{*} Vanauken, in re, 2 Stock. 186; Hutts v. Hutts, 62 Ind. 214.

a lunatic and taking charge of his person and estate should be consummated without personal notice." 1 Such notice is to be served upon the party in person, and it is insufficient for the attorney appointed to defend the party, or a guardian ad litem, to accept service of it.2 And it is within the power of the court to require that the alleged lunatic be given due notice of the time and place of executing a commission of lunacy, although he be a non-resident of the state in which the commission issues.8 In those states in which the jurisdiction over insane persons is by law committed to the courts of probate the statute generally requires a notice to be ordered and served upon a petition for the appointment of a guardian for an insane person, similar to that which issues in the case of a spendthrift or minor. Thus in Massachusetts it is provided that the court shall cause not less than fourteen days' notice of the time and place appointed for the hearing to be given to the supposed insane person; and if, after a full hearing, it appears that the person in question is incapable of taking care of himself, the court shall appoint a guardian of his person and estate.4

§ 56. It has been held that proceedings in lunacy had without notice to the party alleged to be insane are void, so as to render absolutely null decrees and orders passed in the course, or by virtue, of such proceedings. But the better opinion seems to be, the court having jurisdiction of the subject-matter of the proceedings, that want of notice will merely have the effect to render the proceedings voidable by the party himself, not void as to other parties. Nor can

Dozier, ex parte, 4 Baxt. 81; and see Eddy v. The People, 15 Ill. 386; Hutts v. Hutts, 62 Ind. 214; Morton v. Sims, 65 Ga. 298; Hinchman, ex parte, Bright. (Penn.) 181, n.; Isaacs, in re, 1 Leg. Gaz. Rep. (Penn.) 17; Chase v. Hathaway, 14 Mass. 222; Smith v. Burlingame, 4 Mason, 121.

² Segur v. Pellerin, 16 La. 63; Germon v. Dubois, 23 La. Ann. 26.

⁸ Pettit, in re, 2 Paige, 174.

⁴ Pub. Sts. Mass. c. 139, § 7.

⁵ Stafford v Stafford, 1 Martin, N. s. 551; McCurry v. Hooper, 12 Ala. 823; Eslava v. Leprete, 21 Ala. 514; Molton v. Henderson, 62 Ala. 426; Arrington v. Arrington, 32 Ark. 674.

⁶ Kimball v. Fisk, 39 N. H. 110.

advantage of want of notice be taken in collateral proceedings.¹ So although the alleged lunatic has a right to be present at the inquest, and if this right is denied him it is good cause for setting aside the inquisition; yet when an inquisition, taken by order of a court of competent jurisdiction, is returned to and confirmed by the court, it is to be respected like other judgments of the court, until it be reversed or superseded.² And an inquisition which has been confirmed by the court, although not showing that the lunatic was present at the proceedings, is competent evidence as tending to prove the insanity of the party upon the plea of non compos mentis in a collateral proceeding.³

§ 57. Under the English practice a commission of lunacy is to be executed at or near the residence of the party,⁴ unless satisfactory reasons appear for its execution elsewhere.⁵ The reason of the rule appears to be that since the alleged lunatic must ordinarily have performed acts from the nature of which the question of his sanity is to be determined, the principle upon which the crown extends its protection requires that

- ² Bethea v. McLennon, 1 Ired. 523.
- * Arrington v. Short, 3 Hawks, 71.
- ⁴ Southcot, ex parte, 2 Ves. 401; s. c. Ambler, 109; Hall, ex parte, 7 Ves. 261; Baker, ex parte, 19 Ves. 340; s. c. Cooper, 205. But the execution of the commission at a place other than that directed by the Chancellor's order would not seem to be a conclusive reason for quashing the inquisition. Hall, ex parte, 7 Ves. 264.
- Thus, to avoid expense, a commission was issued into Middlesex, although the alleged lunatic resided in Herts. Waters, in re, 2 Myl. & C. 38. See Mills, in re, id. note (a); Baker, ex parte, ubi supra; Shelf. Lun. 96.

Rogers v. Walker, 6 Penn. St. 371; Willis v. Willis, 12 Penn. St. 159; Dutcher v. Hill, 29 Mo. 271. In the latter case it was held that if the party afterward apply to the court to supersede the guardianship on the ground of restoration, and he is found restored, this will be taken to be an admission that the original proceedings were regular, and that the party is estopped to question them, collaterally, afterwards. So if he seek to traverse the inquisition. Rogers v. Walker, ubi supra. The failure to give notice of an application for a commission of lunacy to one of the heirs of the lunatic is, at most, only an irregularity, as he has no absolute right to notice, and will be deemed waived by the heir unless he takes advantage of it immediately on his having knowledge of the proceeding. Rogers, in re, 9 Abb. N. C. 141.

an examination shall be instituted into the circumstances of competence or incompetence under which those acts were performed.¹ In the United States the same principle is applied with more or less strictness.² In those states where lunacy proceedings are not had under commissions issued by the courts of chancery, but the jurisdiction is committed by statute to the probate or other courts, the venue of proceedings will of course be determined by the place of the party's residence or domicile.³ But when a commission issues to ascertain the lunacy of one not a resident of the state, the rule yields to the necessity of the case, since a jury cannot be empanelled beyond the jurisdiction of the court issuing the commission, and the commission may be executed in such county as may be most convenient.⁴

SECTION II.

OF THE PETITION AND AFFIDAVIT.

- § 58. Under the practice of the English Court of Chancery, commissions in the nature of the ancient writs de lunatico inquirendo or de idiota inquirendo 5 issue upon the petition to the Lord Chancellor, which may be filed by the Attorney
 - ¹ Smith, ex parte, 1 Swans. 4, per Eldon, C.
- ² Wilson, ex parte, 11 Rich. Eq. 445; Dumas's Interdiction, 32 La. Ann. 679; Child, in re, 1 C. E. Green, 498; Covenhoven's Case, Sax. 19. In Campbell's Case, 2 Bland's Ch. 209, it was held that the writ de lunatico inquirendo should be directed to the county in which the alleged lunatic resides, but if he be not within the state, then to the county in which he last resided.
- Dana (Ky.), 55. But it is held in the same state that where an ungovernable lunatic is at large, the Circuit Court of any county in which he is found has jurisdiction to hold an inquisition to determine his insanity, and to make proper orders in the matter. Coleman v. Commissioners, 6 B. Mon. 239.
 - 4 Pettit, in re, 2 Paige, 174.
- For ancient forms of these writs, see Shelf. Lun. 80. According to the present English practice, the issue of insanity may be determined either by a commission or by an issue directed to one of the common-law divisions of the High Court of Justice. Act 25 & 26 Vict. c. 86, § 4. The latter alternative, it is said, is seldom adopted. Pope, Lun. 43.

General or by any friend of the alleged idiot or lunatic, and which should be verified by affidavits of the facts upon which the petition is founded.1 The same course of proceeding is pursued substantially in those American courts of chancery to which the custody of insane persons and their estates is committed.2 A mere stranger cannot be allowed to sue out a commission, nor to make himself a party to it by application to the court.8 Although it is usual and proper to require the application for the commission to be accompanied by the affidavit of a physician to the effect that the party is of unsound mind, the court may in its discretion dispense with such affidavit, and issue the writ upon the evidence of a layman; 4 and the proceedings upon the commission will not be void because no affidavit accompanied the petition.5 In those probate courts to which lunacy jurisdiction is committed, proceedings are ordinarily commenced by a simple

- An inquisition against the husband cannot be sued out by the wife in her own name, but must be by her next friend. Campbell v. Campbell, 39 Ala. 312. It is held that an application under the statute, for the committal of an alleged lunatic to a hospital, should be made by his legal guardian, or, when he has no legal guardian, by his relations or friends; and, further, that an application signed by one who is the committee of the alleged lunatic, duly appointed in another state, is not sufficient under the law, such a committee having no power over a lunatic-resident in the state. Rosenberg, in re, 1 Leg. Gaz. Rep (Penn.) 49.
- Boarman's Case, 2 Bland's Ch. 89; Morgan's Case, 3 Bland's Ch. 332; Covenhoven's Case, Sax. 19; Coleman v. Commissioners, 6 B. Mon. 239. In Kentucky, a bill having been filed by the children of an alleged lunatic, praying for an injunction to prevent him from alienating his property and for general relief, it was held, on demurrer, that although the proceedings would be properly begun by petition, yet if the bill filed contained allegations suitable for a petition, the court might proceed upon it as such, treating all unnecessary allegations as surplusage. Nailor v. Nailor, ubi supra. But there is no precedent for converting the petition into a bill in chancery bringing in third parties, although, if it appear that substantial justice has been done on such a proceeding, the finding will not be set aside. Dey, in re, 1 Stock. 181.
 - 8 Covenhoven's Case, ubi supra.
 - 4 Zimmer, in re, 15 Hun, 214.
- ⁵ Bethea v. McLennon, 1 Ired. 523; Lincoln, in re, 1 Brews. (Penn.) 392; Plank's Case, 10 Penn. L. J. 519.

petition for the appointment of a guardian for the party alleged to be insane; and the right of application is generally limited to the relations or friends of the party, or the municipal authorities of the place of his residence.¹

- § 59. The well-being of the lunatic being always the first consideration, as well in the inception of lunacy proceedings as afterwards, the issuing of a commission is within the court's discretion, and does not follow as of course upon the mere fact of lunacy found; 2 for it is said that the mere issuing of a commission may produce consequences highly detrimental to the party, and it is not to issue without great circumspec-And the Chancellor may interpose, personally, in such cases, to give directions to physicians to visit the party, and may consult with them apart; "these being almost the only cases in which a judge is justified and bound to use private means of obtaining information." Thus Lord Cottenham held that occasional unsoundness of mind arising from mere accidental and temporary causes afforded no ground for issuing a commission.4 And a commission was refused where it appeared that the lunatic did not require the protection of the court, either for himself or his property, but it did appear that the object of the petitioner was to obtain for himself a maintenance out of the lunatic's estate.⁵ The issuing of the commission being discretionary with the court, it seems that the refusal of the court to issue it cannot be reviewed by a court of appellate jurisdiction.6
 - ¹ See Pub. Sts. Mass. c. 139, § 7.
- ² Broadhurst, ex parte, Tomlinson, ex parte, 1 Ves. & Bea. 57; Sherwood v. Sanderson, 19 Ves. 280; Rebecca Owing's Case, 1 Bland's Ch. 290; Chattin, in re, 1 C. E. Green, 496. The commission may issue, although the supposed lunatic is an infant. Ibid.; Shelf. Lun. 91; 2 Coll. Lun. 217; Stock, Non Comp. 94. The court, being governed solely by the consideration of what is necessary for the protection of the person and property of the party, has no regard to the possible result of the commission upon the validity of his antecedent acts, or to the motives which have actuated the proceedings. J. B., in re, 1 Myl. & C. 539.
- * Persse, ex parte, 1 Molloy, 219. See Morgan's Case, 3 Bland's Ch. 332.
 - 4 J. B., in re, ubi supra.
 - ⁵ Clare, in re, 3 J. & La T. 571.
 - ⁶ See Colvin, in re, 3 Md. Ch. 258.

- § 60. The court has the power to make interlocutory orders for the protection of the alleged lunatic's person and property pending the proceedings under the commission, or to restrain him from leaving the jurisdiction until the question of his sanity be determined, or to provide for his support and for defending the inquisition in his behalf. But such orders are to be considered as provisional merely, being subservient to the investigation, and cannot be allowed to stand together with an order prohibiting further proceedings under the commission. Under the Civil Code of Louisiana it is held that the court has power, in the exercise of its discretion, to appoint a person to administer the estate of an interdicted person pro tempore; and it is held generally that, where no proper person can be found to act as committee, a receiver of the lunatic's estate may be appointed.
- § 61. Upon a contest for the carriage of a commission of lunacy, the English rule is that the party will be selected to conduct the proceedings who is most likely to bring out the whole truth: subject to this rule the preference is ordinarily given to the nearest of kin of the alleged lunatic. Thus where two petitions for a commission of lunacy were presented, one by the wife of the lunatic, and the other by a nephew jointly with his wife, who was the daughter of the lunatic by a former marriage, it was held that a wife is not entitled to any preference over a child of the alleged lunatic as to the conduct of proceedings, and that it not being shown that there was any impropriety on the part of the nephew

¹ Dey, in re, 1 Stock. 181; B., in re, 1 Ir. Rep. Eq. 181; Wendell, in re, 1 Johns. Ch. 600.

² Lawler, in re, 8 Ir. Rep. Eq. 506.

^{*} Heli's Case, 3 Atk. 635; Holmes, in re, 3 Cond. Eng. Ch. Rep. 626; Nailor v. Nailor, 4 Dana, 339.

⁴ Lawler, in re, ubi supra.

⁵ Civ. Code, arts. 387, 398; State v. The Judge, &c., 18 La. Ann. 523.

⁶ See § 67, post.

⁷ Broadhurst, ex parte, Tomlinson, ex parte, 1 Ves. & Bea. 57; Webb, in re, 2 Phillips, 10; Nesbitt, in re, id. 245. In Anstie, in re, 1 Mac. & G. 200, the carriage of the commission was given, under the circumstances, to the secretary of the Lunatic's Friend Society, in preference to the next of kin of the alleged lunatic.

and daughter, or that the petition of the wife was preferable, the conduct of the proceedings ought to be given to the nephew and daughter, as having presented the earlier petition. So upon a competition between the brother and the wife of a supposed lunatic for the carriage of the commission, the Chancellor gave a preference to the brother, on the ground that, in the particular case, the wife had an interest in preventing the proof of lunacy being carried back beyond a certain period.¹

§ 62. In those jurisdictions where the proceedings upon the commission are ex parte, the granting of applications for leave to attend the proceedings is largely within the discretion of the court; 2 and according to the established practice no persons, except the parties and those claiming an interest of them, may as of right inspect the proceedings.8 This rule applies to relations of the alleged lunatic as well as to others,4 and it has been held that such relations or friends as are known to have counselled a finding of lunacy are excluded from the list of persons competent to receive notice of the execution of the commission.⁵ The application of legatees under the will of the alleged lunatic to attend the proceedings has been refused, as tending, if granted, to establish a bad precedent; and the English rule upon the subject may be stated to be, that the ordinary ground on which leave is given for third parties to attend is that their attendance may be for the benefit of the supposed lunatic or the elucidation of the

- 1 Whittaker, in re, 4 Myl. & C. 441.
- ² Nesbitt, in re, 2 Phillips, 245; Webb, in re, id. 10, 532.
- * Banner v. England, Wood, in re, 4 De G. J. & S. 134. Under the circumstances of these cases, the plaintiffs, in a suit for the administration of the intestate lunatic's personal estate, were allowed to be present at the execution of the commission.
 - 4 Nesbitt, in re, ubi supra.
 - ⁵ Hinchman, ex parte, Bright. (Penn.) 181, n.
- Scarlett, in re, L. R. 8 Ch. App. 739. This case was distinguished from Webb, in re, 2 Phillips, 532, ubi supra, by the fact that in the latter case there were no next of kin of the alleged lunatic. In Brown, in re, 1 Mac. & G. 201, the court doubted whether it was necessary for any purpose in lunacy that an infant heir-at-law should appear by testamentary or legal guardian, or whether there was any process in lunacy by which a legal guardian could be appointed.

matter at issue.¹ And third parties are not admitted to be present, without leave first obtained of the Lord Chancellor sitting in lunacy.²

SECTION III.

OF THE EXECUTION OF THE COMMISSION.

§ 63. Under the practice of the English Court of Chancery, when the commission is to be executed the commissioners in lunacy issue their precept to the sheriff, requiring him to cause a jury of good and lawful men of his county to come before them at a certain time, and in a certain place, to inquire, upon their oaths, of the matters and things which shall be given them in charge, by virtue of the commission.8 This practice is followed, substantially, in New York, and it is held in that state to be improper and irregular for the commissioners to dictate or suggest to the sheriff the names of the persons to be summoned as jurors.4 The number of jurors is not limited to twelve.⁵ No inquest, however, can be taken upon the oaths of fewer than twelve jurors; but if twelve out of a greater number summoned concur in the verdict, it will be sufficient, although the others refuse to join.6 Where the proceedings upon the commission are commenced before a greater number of jurors than is necessary, it is irregular to continue the proceedings before a part only.7 The commissioners under chancery practice, as incident to the performance of their duty, and independent of express statute authority, have power to summon witnesses by subpæna and to compel their attendance.8

- ¹ Rex v. Daly, 1 Ves. Sen. 269.
- ² Clements, in re, 2 Cooper, 166. Shelf. Lun. 95.
- 4 Wager, in re, 6 Paige, 11.
- ⁵ Shelf. Lun. 95, 631.
- 6 Wragge, ex parte, 5 Ves. 450. 7 Tebout's Case, 9 Abb. Pr. 211.
- Shelf. Lun. 103; Plank, in re, 5 Clark, 35; s. c. 3 Am. L. J. 518. The commissioners of lunacy came in the room of another authority, and were meant to have all the powers that authority had; and among these there is reason to say, it must be incident to the office of commissioner of lunatics to summon witnesses." Per Eldon, C., in Lund, ex parte, 6 Ves. 781. In Plank, in re, ubi supra, it was held that a refusal of the commissioners to summon witnesses on the application of the alleged lunatic or habitual drunkard would be fatal to the proceedings.

- § 64. The commissioners and jury have a right to examine the supposed lunatic personally, and to compel those having him in charge to produce him.1 And it is said that the lunatic himself has a right to be present at the execution of the commission,2 but that in some cases his appearance may be dispensed with,8 and, further, that the proceedings will not be void merely because the lunatic was not present.4 The statements upon this subject contained in the decided cases seem hardly to be reconciled with each other; but it is apprehended that in those jurisdictions where the proceedings upon the execution of the commission are ex parte, the supposed lunatic not being entitled, as of right, to notice thereof, he has not, strictly speaking, the right to be present. It seems, on the other hand, where the proceedings are in the nature of a full litigation of the question of sanity between the supposed lunatic and the petitioner for the commission, that as the lunatic has a right to notice of the proceedings,6 so also he has a right to avail himself of such notice and to be present, unless his presence be attended with danger to himself or other persons.7
- Shelf. Lun. 98; Southcote, ex parte, 2 Ves. Sen. 404. But they are not required to make such an examination where the hearing is ex parte. Lincoln, in re, 1 Brews. 392; O'Brien, in re, 1 Ash. 82. Under the English practice, if the persons having the supposed lunatic in their charge refuse or are unwilling to produce him, a warrant for his production at the execution of the commission is to be signed and sealed by the master in lunacy, and served on the persons having the custody. St. 16 & 17 Vict. c. 70, §§ 55, 56, 60; St. 25 & 26 Vict. c. 86, § 18; and see Lund, ex parte, 6 Ves. 781. Moreover, on application to the Lord Chancellor an order may be obtained for the production of the supposed lunatic, disobedience of which will be a contempt. Wenman, in re, 1 P. Wms. 701.
 - ² Cranmer, ex parte, 12 Ves. 455.
 - * Campbell's Case, 2 Bland's Ch. 209.
 - 4 Bethea v. McLennon, 1 Ired. 523.
 - See § 54, ante.
 - ⁶ Ibid.
- In New York it is held that the supposed lunatic may testify before the jury (Dickie, in re, 7 Abb. N. C. 417), and it is apprehended that such is the rule in all jurisdictions where, by statute, parties are made competent witnesses in their own behalf. As to the duties of the commissioners upon the execution of the commission, under the statutes of New York, see Arnhout, in re, 1 Paige, 497.

§ 65. Under the English practice in lunacy the commissioners were required to execute the commission within a month after it had issued, and to return the inquisition with the commission into chancery within a month after it had been taken.¹ In Pennsylvania it is held that the commission should have a return-day named therein,² and it is apprehended that in lunacy proceedings had in chancery, in the United States, the court will generally limit the time within which the commission shall be executed. Under the statute, in England, it was provided that the commission should be indented ³ and under the seals of twelve jurymen,⁴ failing in either of which particulars it would be void.⁵ In Kentucky it was held that only when the inquisition is executed in the country is it necessary that it should be returned under the hands and seals of the jury.⁶

SECTION IV.

OF THE RETURN AND FINDING OF THE INQUISITION.

§ 66. The commission, verdict, and return in lunacy proceedings must be consistent upon the face of the record, and therefore the verdict must be in the words of the commission, or equivalent words. Formerly the return upon inquisitions found that the party was either lunaticus, non compos mentis, or insanæ mentis (or, after proceedings were had in English, "of unsound mind"). And the strict legal definitions of these terms being insisted on, a return involving any

- ¹ Shelf. Lun. 106; St. 1 Henry VIII. c. 8.
- ² Plank, in re, 5 Clark, 35; s. c. 3 Am. L. J. 518; Lincoln, in re, 1 Brews. 392.
 - ⁸ St. 36 Edward III. c. 13.
 - 4 St. 1 Henry VIII. c. 8.
- It is a contempt of court for one to keep a commission of lunacy by him for a long time without putting it into execution, and such a commission was discharged, with costs, on account of the improper use which might be made of it, particularly to terrify and distress the person against whom it had been issued. Anon., 2 Atk. 52; Shelf. Lun. 107.
 - ⁶ Lackey v. Lackey, 7 B. Mon. 398.
 - ⁷ Shelf. Lun. 108.
 - See § 1, ante, note.

inconsistency in the use of such terms would be quashed.1 Thus in a case where the inquisition found that a person was a lunatic, and had been in the same state of lunacy from the time of her birth, Cottenham, C. said the proper finding would have been that she was of unsound mind; and that the finding as it stood was a contradiction in terms, and ordered that the inquisition be quashed and a new commission issue.2 But under the more liberal construction of terms which obtains in the modern cases, words of definition used, in their strict sense, inconsistently with others may be treated as superfluous merely, and the use of them will not be reason for quashing the return. Thus it was held on a return to a writ de lunatico inquirendo to the effect that the alleged lunatic "is a lunatic, and of unsound mind, and does enjoy lucid intervals," that the phrase italicized, whether read parenthetically or not, was not objectionable either in form or And so it was held that proceedings upon an inquisition were not to be taken as void because the jury found that the party "was lunatic and idiotic," they having also found that he was "of non-sane memory;" the former words being rejected as surplusage.4 If the return be that the party is a lunatic, it is not necessary to state that he has lucid intervals.5

- § 67. But the return must find distinctly, in order to be valid, that the party is insanæ mentis, either by the use of
- ¹ For a collection of the earlier cases in which the forms of returns were considered, see Shelf. Lun. 108-111.
 - ² Bruges, in re, 1 Myl. & C. 278.
 - ⁸ Hill, in re, 4 Stew. 203.
 - 4 Bethea v. McLennon, 1 Ired. 523.
- 5 Shelf. Lun. 111; Ferne, ex parte, 5 Ves. 450. "The practice of inserting in the return a finding on the subject of lucid intervals is derived from the ancient practice under the writ de lunatico inquirendo, which was applicable only to those who were alleged to be lunatics. . . . Anciently only those insane persons who enjoyed lucid intervals were regarded as lunatics, the mental disorder being thought to be dependent on the moon." Hill, in re, ubi supra; and see § 1, ante. In Atkinson, ex parte, Jac. Ch. 333, Lord Eldon refused to grant a committeeship upon a return being made that the party was a lunatic enjoying lucid intervals, and that during such intervals he was competent for the government of himself and his affairs, and ordered a new commission to be issued.

the generic words "unsound mind," or the specific words "lunatic," "idiot," or the like.1 Thus that was held an illegal and void return which found that the party was incapable of governing himself or his lands.2 So it is not sufficient for the jury to find that the individual proceeded against is incapable of managing his affairs or governing himself in consequence of mental imbecility and weakness. To authorize the court to appoint a committee upon the presumption that his mind is so far impaired as to reduce it to the state ot idiocy, the jury must find distinctly that he is of unsound mind, and mentally incapable of governing himself or of managing his affairs.8 The reason of the rule obviously rests on the consideration that it is not every case of mental weakness or imbecility which will authorize the court of chancery to exercise the power of appointing a committee of the person and estate; but to justify the exercise of such a power the mind of the individual must be so impaired as to be reduced to a state which, as an original incapacity, would have constituted a case of idiocy.4 When the appointment of a committee is necessary, and no person can be found to act as such, or when pending the return of the commission

- ¹ A verdict of unsound mind is equivalent to a verdict of idiocy or lunacy. Sherwood v. Sanderson, 19 Ves. 280.
- Barnsley, ex parte, 3 Atk. 168. As to the form of return required upon commissions in the nature of commissions de lunatico inquirendo, see § 1, note. Under 25 & 26 Vict. c. 86, § 3, the issue upon the inquiry of insanity is prescribed to be "whether or not the person is of unsound mind and incapable of managing himself or his affairs." The finding of the jury should of course conform in terms to the issue as thus framed.
- Morgan, in re, 7 Paige, 236; and see Mason, in re, 3 Edw. Ch. 380, 1 Barb. 436; Rogers, in re, 9 Abb. New Cas. 141. But in Massachusetts the statute provides that a guardian shall be appointed for a person alleged to be insane, if after a full hearing it appears to the court that the person in question is incapable of taking care of himself. Pub. Sts. c. 139, § 7. The recommendation of a jury, in its verdict of sanity on an inquisition of lunacy, that the alleged lunatic, from long confinement and its consequences, may require some temporary guardianship, is proper, and does not impair the legal effect of the verdict. Dickie, in re, 7 Abb. New Cas. 417.

⁴ Morgan, in re, ubi supra.

the estate of the lunatic appears to be suffering, the court may appoint a receiver of the estate.1

- § 68. It is within the sound discretion of a court of chancery to set aside the finding of a commission of lunacy and to direct the issuing of a new commission, when it is manifest from the evidence that the jury have erred in matter of fact,² or when, through a mistake of duty, they have returned an irregular and unsatisfactory finding.³ So the court may make a personal examination of the lunatic, in order to ascertain whether the finding of the inquisition is erroneous.⁴ And it is held that the court may order a second inquisition to be issued at some time after the first, if it is made to appear that there is an evident change in the condition of the subject.⁵ But an inquisition will not be set aside for mere irregularity when, the subject having been found lunatic in proper form, there is no doubt of his insanity.⁶ In a case where commissions of lunacy had been
- Warren, ex parte, 10 Ves. 622; Radcliffe, ex parte, 1 Jac. & W. 639; Kenton, in re, 5 Binn. (Penn.) 613. The court may issue an injunction to stay waste of the lunatic's property, without a bill being filed, on application of the receiver. Chinnery, in re, 6 Ir. Eq. 469.
- ² Lasher, in re, 2 Barb. Ch. 97; Glen, ex parte, 4 Desauss. 546; Lord Donegal's Case, 2 Ves. Sen. 408. In New York, the proceedings upon the commission not being ex parte, and the party, strictly speaking, having no right to traverse the inquisition, it is held that the subject of the commission is entitled to a new trial of the writ, if it appear that the finding against his sanity was induced by bias or previously formed opinion on part of the jury. Tebout's Case, 9 Abb. Pr. 211.
- * Collins, in re, 3 C. E. Green, 253; Lawrence, in re, 1 Stew. 331; 1 Coll. Lun. 155.
- ⁴ Fitzgerald, in re, 3 Stew. 59. And it is said that where there is doubt of the insanity of one declared a lunatic, he should be apprised of that fact and of the Chancellor's readiness to hear any communication from him or in his behalf. Morgan's Case, 3 Bland's Ch. 332.
 - ⁵ Collins, in re, ubi supra.
- Rogers, in re, 9 Abb. New Cas. 141. In Hinchman, ex parte, Bright. (Penn.) 181, n., it was said that a second commission could not issue upon the original petition, the proceedings under the first commission having been set aside. But Lord Eldon appears to have ordered a new commission upon the original petition in Atkinson, ex parte, Jac. Ch. 333 (see Shelf. Lun. 110), and the practice would seem to have been often followed.

issued and committees had been appointed, successively, in two courts of co-ordinate jurisdiction, the court, on application of the first-appointed committee, superseded the second commission, and set aside its own proceedings as null and void.¹

SECTION V.

OF THE SUPERSEDEAS OF THE COMMISSION.

- § 69. Upon the recovery of a lunatic, so found by inquisition, the court may, upon his petition, grant a supersedeas of the commission.² But a petition to supersede the commission will not be entertained unless the petitioner be personally present in court, or, at least, in such a situation that he may be examined personally by the Chancellor or some one in his behalf.³ A commission will not be superseded as to the person of the petitioner, and at the same time continued in force as against the parties who have been made accountable for
 - ¹ Walker v. Russell, 10 S. C. 82.
- ² Bumpton, ex parte, Moseley, 78; Ferrars, ex parte, id. 332. In the latter case the court suspended the commission for some months to see if the petitioner was perfectly recovered, he having often relapsed and having been found a lunatic with lucid intervals. See Drayton, ex parte, 1 Desauss. 144; Price, in re, 4 Halst. Ch. 533.
- * Dycs Sombre, in re, 1 Phillips, 436; Gordon, in re, 2 Phillips, 242. Whether if a lunatic escape to a foreign country, and while there is pronounced by a competent tribunal to be of sound mind, the court will give such credit to that decision as to entertain a petition without the party first returning for examination, queere. Dyce Sombre, in re, ubi supra. cases of lunacy under the English practice the petition for a supersedeas is heard before the Chancellor in person without a reference. And the commission will not be superseded without the evidence of physicians and the attendance of the lunatic." Weis, in re, 1 C. E. Green, 318. In the American courts of chancery the more usual course is to refer the petition to a master to take proofs as to the state of mind of the petitioner, and to report thereon. But after report that the petitioner is restored, the Chancellor, in his discretion, may direct the petitioner to appear before him for inspection and examination. Rogers, in re, 1 Halst. Ch. 46; Folger, in re, 3 Johns. Ch. 567. The Chancellor may, in his discretion, discharge the guardian or committee on the ground of restored sanity, or direct an issue or traverse to try the question. Weis, in re, Price, in re, Rogers, in re, ubi supra.

the petitioner's estate. It is said, in general, that although a commission may be refused in the discretion of the court, yet, it being once granted, very different considerations will regulate the discretion of the court in allowing it to be superseded; and that although lunatics are in some respects entitled to a similar privilege as infants in respect of the disregard of mere form in the protection of their interests, yet this indulgence is not to be granted in its greatest extent to a lunatic applying for a supersedeas, since the latter cannot be permitted, at the same time, to assert his soundness of mind and to claim the benefit of any relaxation of practice conceded to those of unsound mind.2 Where one had been duly found a lunatic and committees of his person and estate had been appointed, the court declined to discharge the committee of the person upon the lunatic's petition, alleging that he was so far restored to reason as to be able to govern himself, it not appearing that he had become competent to manage his estate and no application having been made for the discharge of the committee of the estate.8 Under the Lunacy Regulation Acts a supersedeas may in England be granted in order to permit an alteration of the arrangements originally made in respect of the custody of the lunatic's person and property.4

§ 70. In those states where the determination of the fact of insanity is had, and the appointment of a guardian for the party, if he is found insane, is made, upon a petition to the court of probate the party, in case of his restoration, may ordinarily take a like remedy to that afforded by a supersedeas in the chancery courts, by a petition addressed to the judge to have the letters of guardianship set aside and his estate returned to him. And it is held in an early case in Massachusetts, upon an appeal taken from the order of the

¹ Gordon, in re, 2 Phillips, 436. But a lunatic, recovered, will be allowed, without superseding the commission, to have the control of his fortune, and to superintend the prosecution of actions against accounting parties, without the intervention of the committee. Ibid.

² Dyce Sombre, in re, 1 Mac. & G. 116.

^{*} Burr, in re, 17 Barb. 9.

⁴ St. 16 & 17 Vict. c. 70, § 152; 25 & 26 Vict. c. 86, § 10; Pope, Lun. 190, 192.

judge disallowing such a petition, although the statute in terms required appellants in probate proceedings to give bonds to prosecute their appeals, that the appellant in the case at bar was to be exempted from giving such a bond. Sedgwick, J., said: "The appellant has been adjudged of such mental debility as to be incapable of contracting and taking care of himself, and he has had guardians, for that reason, appointed. That decree is now in force, and he is the ward of these guardians. How, then, has he the capacity of making these bonds, without which, it is said, his wardship shall be perpetual, however perfectly his mind may have become restored? But how are such bonds necessary? They are to satisfy the costs to which the appellees will be entitled in consequence of the final rejection of his petition by a decision against him. Now the letters of guardianship will either be repealed, and in that case the appellees entitled to no costs, and the bond, of course, wholly unnecessary; or the guardianship will be confirmed, . . . because the appellant is proved to be non compos mentis, and in such circumstances his contracts in general, and of course such bond, would be void. To this it may be added that the whole estate of the appellant is in the hands of the appellees, and they will, if their guardianship continue, be able to pay themselves." 1

SECTION VI.

OF THE TRAVERSE OF THE INQUISITION.

(a.) In England.

§ 71. Formerly, under the English practice in lunacy, the proceedings upon the writ de lunatico inquirendo were ex parte, the alleged lunatic not being entitled as of right to notice thereof,² since the proceedings were had for the information of the court, which might refuse to issue a commission,⁸ or might supersede a commission once issued, so that the right

¹ M'Donald v. Morton, 1 Mass. 543.

² A different practice is now established under the Lunacy Regulation Acts and General Orders in Lunacy. See § 54, ante.

^{*} See § 59, ante.

of the party to have the question of his insanity passed upon by a jury of the country in a court of law 1 was to be exercised, if at all, upon a traverse of the inquisition. Although the party's right to traverse the finding of the inquisition appears to have been doubted or reluctantly admitted in some of the earlier cases,2 it was clearly established in the leading case of Cumming, in re,8 in which St. Leonards, C., reviews the authorities in an elaborate opinion. But he adds that the fact of the traverse being of right does not preclude the Lord Chancellor from exercising such control over the matter as may be necessary for the protection of the person and estate of the alleged lunatic; as, for instance, by satisfying himself that the application for leave to traverse is made in good faith, and that the alleged lunatic, where he is the person applying, is competent to judge of what he is doing, and really desirous that the traverse shall issue.4. Under the

- 1 See § 24, ante.
- ² See Barnsley, ex parte, 3 Atk. 184.
- * 1 De G. Mac. & G. 537; s. c. 21 L. J. N. s. Ch. 753; 16 Jur. 483; see also Bridge, in re, Cr. & P. 338. In Cumming, in re, the Chancellor said that the right to traverse rests in the first instance upon the St. 2 & 3 Edw. VI. c. 8, § 6 (and see remarks of Eldon, C., in Ward, ex parte, 6 Ves. 579; Staunton on the King's Prerogative, cap. 20, Traverse, p. 68); he also observed that although Lord Hardwicke "did in some sense put it as a matter of right, yet it is impossible to deny that he went into and examined the circumstances of each case, in order to satisfy his mind that it was proper for him to grant the traverse;" and that Lord Thurlow, in Fust, in re, 1 Cox, 418, no doubt following Lord Hardwicke, entered into the circumstances of the case. As regards the later cases the Chancellor said: "It is clear that every successive chancellor since Thurlow has been of opinion that the issuing of the writ is in some sense or other a matter of right, even of a stranger." He added: "I am clearly of opinion that the act 6 Geo. IV. c. 53, does not affect this question." For earlier cases upon this point, not cited above, see Roberts, exparte, 3 Atk. 5; Heli, in re, id. 635; opinion of Loughborough, C., in Wragg, ex parte, Ferne, ex parte, 5 Ves. 450, 832; Sherwood v. Sanderson, 19 Ves. 280; Neville, in re, Crawf. & Dix, Abr. Notes, 55; Bridge, in re, Craig & Phil. 338.
- 4 Whether, if the Chancellor should not otherwise be able to satisfy himself on the points above mentioned, he would allow any and what evidence to be gone into respecting them, quære. It is held that a private examination of the petitioning party by the Chancellor is necessary only in cases in which the wish to traverse is doubtful. Neville, in re, Crawf. & Dix, Abr. Notes, 55.

modern English practice in lunacy, any person entitled, and desiring, to traverse an inquisition may present a petition for that purpose to the Lord Chancellor sitting in lunacy within three months next following the day of the return of the inquisition. The Chancellor thereupon makes his order limiting a time, not exceeding six months, within which the parties are to proceed to try the traverse; and if the petitioner is not the alleged lunatic, he may be required to give proper security for all parties proceeding to trial within the time limited.¹

§ 72. The question whether any person, other than the lunatic, who might be aggrieved by the finding of lunacy should be allowed to traverse was held by Lord Thurlow to be within the discretion of the court to decide, and he accordingly refused leave to traverse to the husband of the lunatic under circumstances which rendered the validity of the marriage doubtful.2 Lord Eldon, while considering it a doubtful question whether a mere stranger having no interest would be permitted to traverse,8 held that the right to traverse was secured by statute 4 to certain persons,5 and allowed the privilege to one having an interest under a contract with a lunatic where there had been a retrospect of ten years, and it appeared that the alleged lunatic had no notice of the inquisition; 6 and the modern authorities favor the view that a party in interest has the like right to traverse the inquisition with the lunatic himself,7 and this view would seem to be supported by strong equitable considerations.

¹ St. 16 & 17 Vict. c. 90, § 148.

² Fust, in re, 1 Cox, 418.

^{*} In the United States the right to traverse is not permitted to a mere stranger. Covenhoven's Case, Sax. 19; Rorback v. Van Blascom, 5 C. E. Green, 461; Armstrong v. Short, 1 Hawks, 11.

⁴ St. 2 & 3 Edw. VI. c. 8, § 6. ⁵ Ward, ex parte, 6 Ves. 579.

⁶ Hall, ex parte, 7 Ves. 261. See Sherwood v. Sanderson, 19 Ves. 280, where the subject of traverse of inquisitions in lunacy is discussed with great elaboration by Lord Eldon.

⁷ Cumming, in re, 1 De G. Mac. & G. 537; Nailor v. Nailor, 4 Dana, 339. In Yauger v. Skinner, 1 McCart. 389, the court in New Jersey held that it might, "in its discretion," permit a purchaser whose conveyance was overreached by an inquisition in lunacy to traverse the finding, on his agreeing to be bound by the final decision on the traverse.

traversing, whether the alleged lunatic himself, or a party in interest with him, is bound by the result of the traverse.1

- § 73. When the traverse of an inquisition is petitioned for, whether by the alleged lunatic himself, or another, the lunatic must be brought coram rege in concilio, which means into the Court of Chancery in his proper person,² in order that the Chancellor may satisfy himself that the application is made in good faith, and that the traverse is desired by the lunatic.8 The traverse being ordered, an issue is framed,4 and the record is carried from the Court of Chancery to the crown side of the King's Bench, in which court issue is joined for the crown by the Attorney General and trial had, the traverser being considered as defendant, and the prosecutor having the right to make up the record.⁵ It is within the discretion of the court to order the traverse to be tried in a different county from that in which the subject of the inquisition had been found a lunatic, and to make necessary orders for the protection of the party pending the trial of the traverse.7 The verdict on the traverse is, in England, returned
 - ¹ Robert's Case, 3 Atk. 308.
- ² Fitzherbert, Nat. Brev., De Idiota inquirendo et examinando, 532; Southcote, ex parte, Amb. 110; Heli, in re, 3 Atk. 635. In the latter case it is said that the party seems to have gone to Petty Bag Office and entered the traverse without the intervention of the court; but the proceeding seems to show, notwithstanding, that Lord Hardwicke left the traverse to be tried without interfering with it. Per St. Leonards, C., in Cumming, in re, ubi supra.
 - * See § 59, ante; § 75, post.
- 4 "A traverse is a summary proceeding, setting out the inquisition, and traversing or denying the facts thereby found. . . . The issue will be badly joined if the plea to the inquisition takes up a fact not stated in it." Shelf. Lun. 115, 116.
- * Rex v. Roberts, 2 Str. 1208; Regina v. Mason, 2 Salk. 447; Regina v. Neville, Crawf. & Dix, Abr. Notes, 96; Shelf. Lun. 116, 117; and see Wright, ex parte, 1 Vern. 155. But it is held that the traverser has the right to begin upon the trial of the issue. Regina v. Loveday, 5 Cox, C. C. 343. See, contra, Commonwealth v. Haskell, 2 Brews. (Penn.) 491.
- ⁶ Nugent, in re, 2 Molloy, 517; Wilson, ex parte, 11 Rich. Eq. (S. C.) 445.
- ⁷ St. 16 & 17 Vict. c. 70, § 151; Armstrong, in re, 2 De G. & J. 123. In this case a lady who had been found lunatic obtained leave to traverse, and no committee was appointed. Her husband, who had petitioned for

into the Petty Bag Office of the Court of Chancery. If the finding of the inquisition is confirmed, the proceedings in lunacy of course continue; if reversed, the party is at once restored to all the rights of which the original finding deprived him.¹

(b.) In the United States.

\$74. In New York it is held by the Court of Chancery that it is not a matter of course to allow a traverse or a feigned issue in lunacy cases, unless where the court entertains a reasonable doubt as to the justice of the finding of the jury upon the execution of the commission.² But it is to be borne in mind that the refusal of a traverse cannot in New York, nor generally in the United States, abridge the constitutional rights of the alleged lunatic, since the proceedings on the execution of the commission are not, as in the English courts, ex parte; but a person proceeded against as a lunatic, except, possibly, in cases of confirmed and dangerous madness, is entitled to reasonable notice of the time and place of holding the commission, and a reasonable time within which

the inquisition, having before the trial of the traverse become incapable of attending to business, the court appointed interim committees of the lady's person, with liberty to take such proceedings with respect to the traverse as they should think fit.

- ¹ Pope, Lun. 78.
- ² Russell, in re, 1 Barb. Ch. 38; Mason, in re, 1 Barb. 436; Clapp, in re, 20 How. Pr. 385. In Christie, in re, 5 Paige, 242, Walworth, C., declined to grant an application in the name of the lunatic for leave to traverse the inquisition, unless satisfied upon a private examination of the lunatic or by the report of a master that such was the wish of the lunatic, or that he was capable of understanding the nature and object of the application. And he added: "In this case, as it appears that the alleged lunatic, in consequence of his age and other infirmities, cannot be brought before the court to be examined personally, I should not grant the traverse upon his application, without first having him examined privately by one of the masters of this court." It is held in the same case that, where a petition or affidavit is sworn to by a person who has been found by the inquisition of a jury to be a lunatic, the officer before whom the same is sworn should state in the jurat that he had examined the deponent for the purpose of ascertaining the state of his mind, and that he was apparently of sound mind and capable of understanding the nature and contents of the petition or affidavit.

to produce his witnesses before the jury summoned upon the inquisition.1

- § 75. The considerations last referred to seem to govern the court in the same state in holding that, upon the traverse of an inquisition duly returned, it may direct the course of the proceedings in such manner as may be most useful and expedient, so as best to inform its conscience and afford the safest conclusion as to the existence of the fact of lunacy. Thus the lunatic may be brought into court after the inquisition is returned and an inquiry be made by inspection, or an issue may be awarded to ascertain by a verdict at law the existence or continuance of the lunacy. And the most usual and proper course is said to be to have the issue made up and prepared for trial, under the direction of the Court of Chancery, instead of delivering over the record and traverse after the Attorney General has joined issue thereon.2 And it is further held, the whole of the proceedings upon a traverse or issue framed being intended to inform the conscience of the court, that the verdict upon such traverse or issue may be set aside, in the court's discretion. Thus where an inquisition had been found which the supposed lunatic was allowed to traverse, and the traverse jury likewise found a verdict against the traverser, whereupon the petitioner in the original proceeding moved for the appointment of a committee of the lunatic's person and estate, and the alleged lunatic moved to dismiss the proceedings on the whole case, it was held that it was the duty of the judge hearing these motions, he having presided at the trial and heard all the evidence, and having a full and fair opportunity
- Russell, in re, ubi supra. See § 54, ante. In Indiana it is held that one being found insane by a jury and a guardian appointed, he cannot, under Rev. Sts. 1852, p. 333, §§ 2-10, upon his own application or that of his next friend, have inquiry into the proceedings upon the inquisition, or into the fact of his restoration to sound mind. Such inquiry can only be had upon the application of some other person. Gillespie v. Thompson, 7 Ind. 353; Meharry v. Meharry, 59 Ind. 257.
- ² Wendell, in re, 1 Johns. Ch. 600. "The practice here has been to award an issue in all cases where a jury trial was proper, instead of permitting a formal traverse." Tracy, in re, 1 Paige, 580. See Giles, in re, 11 Paige, 638; M'Clean, in re, 6 Johns. Ch. 440.

of knowing the mental condition of the party, to dispose of the whole matter on its merits, and, if the verdict was unsatisfactory, to set it aside and dismiss the proceedings.¹

- § 76. The courts of New York and the American courts generally hold that parties in interest with the supposed lunatic may be permitted to traverse the inquisition. was permitted to a purchaser whose conveyance was overreached by the inquisition, upon his stipulating to be bound by the decision upon the traverse.2 And where the court had directed a feigned issue in chancery to try the question of lunacy, and a third person whose conveyance was overreached by the inquisition had consented to join in the issue and be bound by the result thereof, it was held that the counsel for the respective parties to the suit were not authorized to abandon the trial of the issue without the sanction of the court, and so to leave the question of the validity of the lunatic's conveyance to be decided in some other mode. And the court set aside such an agreement and ordered the trial of the feigned issue to proceed.8
- § 77. In South Carolina the right of the lunatic to traverse the inquisition on petition filed is recognized, and is held to be derived from the St. 2 & 3 Edw. VI. c. 8, § 6, which statute is considered in force in South Carolina by virtue of the colonial act of 1712, declaring of force all statutes which "declare the rights and liberties of the subject and enact the better securing the same." And a further reason of the rule in that

¹ Shaul, in re, 40 How. Pr. 204.

² Christie, in re, 5 Paige, 242. (But it seems that the alienee of the alleged lunatic would be so bound even without any stipulation. See Roberts's Case, 3 Atk. 308, cited ante, § 72.) So in South Carolina it is held that the supposed lunatic's alienee may himself traverse, or join in the lunatic's traverse. Medlock v. Cogburn, 1 Rich. Eq. 477. In Pennsylvania, where a petition de lunatico inquirendo had been filed by a brother of the alleged lunatic, who, upon a trial by the jury of inquisition, was found sane, the petitioner sought to traverse the finding, and the court held that any person against whom a decision was rendered in the proceedings was aggrieved, within the meaning of the act of June 13, 1836, § 17, and so that the petitioner had a right to traverse. Dickinson, in re, 1 W. N. C. 96.

^{*} Giles, in re, 11 Paige, 243; Folger, in re, 4 Johns. Ch. 169.

⁴ Medlock v. Cogburn, 1 Rich. Eq. 477; Walker v. Russell, 10 S. C. 82.

state is found in the fact that the court there holds, in accord with the English Court of Chancery, that an alleged lunatic has, strictly speaking, no right to notice of the execution of the commission.1 But in New Jersey it is considered that the statute 2 & 3 Edward VI. does not make part of the common law of the state, and that the right of the alleged lunatic, or a party in interest with him, to traverse the inquisition exists in chancery independent of statute.2 In Pennsylvania it is held that upon the traverse of a finding in lunacy the commonwealth has the right to open and close.⁸ And in the same state the allowance of a writ of error to the rulings and charge of the court is permitted upon the trial of a traverse.4 And generally in those states where inquisitions in lunacy are had in the courts of common law of inferior jurisdiction an appeal will lie to the court of final jurisdiction in behalf of a party aggrieved by the judgment below.⁵

- § 78. In Massachusetts, and generally in those states where the care of insane persons and their estates is committed to
- ¹ Medlock v. Cogburn, 1 Rich. Eq. 477. In South Carolina the jurisdiction in cases of lunacy is concurrent in the courts of Probate and of Common Pleas, but the jurisdiction to grant a traverse is in the Common Pleas exclusively. Walker v. Russell, ubi supra. So in Pennsylvania it is held, under St. June 13, 1836, § 13, that one who has been found a lunatic under an inquisition in the Common Pleas may not present a petition in the Orphan's Court, notwithstanding a traverse to the inquisition is pending in the Common Pleas. Frey's Estate, 3 W. N. C. 371.
- ² Covenhoven's Case, Sax. 19. The interest of a party seeking a traverse, in order to entitle him to a traverse, must be such an actual interest, legal or equitable, which would be endangered by the existence of the finding of lunacy. Ibid. So a mere stranger to an alleged idiot, with no allegation of relationship to her, or present or prospective interest in her property, cannot appeal from an order appointing her guardian. Rorback v. Van Blascom, 5 C. E. Green, 461. In Covenhoven's Case, ubi supra, it was held that one found a lunatic might appear and traverse the inquisition by attorney, but that an idiot must appear before the court in person, citing Roberts, ex parte, 3 Atk. 5. But see that case, and § 73, ante.
 - * Commonwealth v. Haskell, 2 Brews. 491.
 - 4 McGinnis v. The Commonwealth, 74 Penn. St. 245.
- ⁶ Cooper v. Summers, 1 Sneed, 453; Cuneo v. Bessoni, 63 Ind. 527. In Illinois, where a party declared lunatic on proceedings in the Circuit Court afterwards petitioned in same court, alleging sanity, &c., it was held that latter proceedings were, in substance, in the original cause. Ayres v. Musseter, 46 Ill. 472.

guardians appointed by the courts of probate, such guardians may be discharged by the court upon the application of the ward or otherwise, whenever it appears that the guardianship is no longer necessary for the safety and well-being of the ward or his estate; 1 and, as in other probate proceedings, an appeal lies from the decree in any case appointing a guardian for an insane person. And on such an appeal it was held that the appellant need not be required to give the bond ordinarily required upon probate appeals, even although the case is not excepted by the statute, since if on the hearing of the appeal it appear that the appellant is insane he is incapable of executing a valid bond, and if the appeal is sustained the appellee, and not the appellant, is answerable in costs.2

SECTION VII.

COSTS IN LUNACY PROCEEDINGS.

- § 79. It would appear to be a general rule that in proceedings to establish the insanity of a party the whole matter of the allowance of costs, in the absence of statute regulations upon the subject, rests in the sound discretion of the court having jurisdiction of the proceedings. When the subject of the inquisition or other proceeding is found to be insane, the costs of the inquiry are ordinarily to be borne by the insane person or his estate. If the proceedings result in a finding of sanity, the allowance of proper costs will be determined by considering whether the proceedings were instituted upon probable
 - ¹ Pub. Sts. Mass. c. 139, § 12.
 - ² M'Donald v. Morton, 1 Mass. 543.
- Beckwith, in re, 3 Hun, 443; Root, in re, 8 Paige, 625. By the Lunacy Regulation Act, 25 & 26 Vict. c. 86, § 9, the Lord Chancellor is authorized in all lunacy proceedings to order costs to be paid by the parties respectively presenting or opposing the petition, or out of the estate of the supposed lunatic, or partly in one way and partly in another, as he shall think proper.
- See ch. iv. sec. iii., post, and cases cited. In Indiana it is held, under the act of 1852, 2 G. & H. 573, § 5, that the guardian of an insane person may be required to pay an attorney employed by the children of such person to prosecute the proceedings in which the latter was adjudged insane and the guardian appointed. Brownlee v. Switzer, 49 Ind. 221.

cause and in good faith, as being for the benefit of the supposed lunatic. If so instituted, the prosecutor of the inquiry will not be ordered as of course to pay costs. But the contrary rule would seem to prevail when the proceedings have been instituted maliciously and without probable cause.2 If the case appear to have been one calling for inquiry, it seems that the respondent will not be allowed costs although he is found to be sane.8 And where, under the Lunacy Regulation Act, 25 & 26 Vict. c. 86, § 11, an inquiry as to the sanity of the supposed lunatic had been instituted on the report of the Commissioners of Lunacy, and had resulted in his being declared of sound mind, the court ordered the costs of the proceedings in lunacy and of the inquiry to be paid out of the supposed lunatic's estate.4 The modern view of the law appears to be that all costs and expenses incurred in lunacy proceedings, undertaken in good faith and upon probable cause, are to be considered as in the nature of necessary expenses incurred for the benefit of the party, and for the payment of which he or his estate is bound as by an implied contract.⁵ And a court of equity may, after the death of the lunatic, order the costs of the commission, taxed in his lifetime, to be paid out of funds to which he was entitled, and which at the time of his death are within the control and disposition of the court.⁶ But where a lunatic who had recovered his senses

- ¹ Brower v. Fisher, 4 Johns. Ch. 441; Arnhout, in re, 1 Paige, 497; Giles, in re, 11 Paige, 243, 638; White, in re, 2 C. E. Green, 274; E. S., in re, L. R. 4 Ch. D. 301.
 - ² White, in re, ubi supra; Shelf. Lun. 105.
- * Windham, in re, 4 De G. F. & J. 53. The court doubted whether it had jurisdiction to deal with the costs. In New York it was held that where, in proceedings de lunatico inquirendo, an inquisition is found in favor of the alleged lunatic, the court cannot grant an allowance for counsel fees, expert witnesses, &c., to him, and charge the same upon the petitioner. McAdams, in re, 19 Hun, 292.
 - ⁴ C., in re, L. R. 10 Ch. App. 75.
 - ⁵ See ch. ix. sec. iii., (a), post, and cases cited.
- Tayler v. Tayler, 3 Mac. & G. 426. Costs were refused to one who had sued out a commission of lunacy which was never acted on and had been superseded, there being no funds upon which an order of the court could be made to attach. Glover, ex parte, 1 Mer. 269. Whether, the proceedings being had in good faith and upon probable cause, the amount of the costs might not have been recoverable in an action against the sup-

before his property had been taken possession of under the lunacy, or any committee had been appointed, petitioned for and obtained a supersedeas of the commission, and his father, who had procured the commission to issue and incurred expenses in respect of it, asked that the petitioner should be ordered to reimburse the expenses so incurred, the court held that they had no authority to make such an order.¹

§ 80. It was formerly held by the English courts that no costs could be allowed the petitioner upon leave given to traverse the inquisition; but it seems that the allowance of a sum of money out of the alleged lunatic's estate towards defraying the expenses of the traverse may be made, in the Chancellor's discretion. It was further held that, after the finding of a jury upon a traverse of an inquisition of lunacy that the alleged lunatic was of sound mind, the court, acting in the jurisdiction in lunacy, had no authority under the statute 6 Geo. IV. c. 53, or otherwise, to direct payment out of the property of the alleged lunatic of any costs incurred with reference to the commission, although the verdict upon the traverse did not negative the existence of lunacy at the time of the original inquisition. But where C., having been

posed lunatic or his estate, quære. Where real estate of the insane person had been sold by order of the court, it was held that the costs of the preceding inquisition could not be paid from the resulting fund until the costs of the sale and the debts of creditors having a prior lien had been satisfied. Malone's Appeal, 79 Penn. St. 481. Costs of an inquisition should be taxed and allowed by the court having jurisdiction of it. Thus in New Jersey it was held that the Orphan's Court could not tax and settle the costs on a commission of lunacy, and that the accounting party ought to produce and show to that court a regular bill of costs on the commission, settled and taxed by the proper officer of the Court of Chancery. Gulick v. Conover, 3 Green, 420.

- ¹ Anonymous, 4 De G. & J. 103.
- ² Sherwood v. Sanderson, 19 Ves. 280; s. c. Cooper, 108.
- * Bridge, in re, Craig & Phil. 338. And the solicitor's costs will be a debt against the estate. Ibid.
- Loveday, ex parte, 1 De G. Mac. & G. 275. "Nor does a petition of the alleged lunatic for a supersedeas, and the delivery up of his papers and other property by the committee and the petitioners for the commission, entitle them to their costs as part of the terms on which such order should be made, even where the court has, by an order in the lunacy before the verdict on the traverse, directed the costs to be taxed." Ibid.

found lunatic, obtained leave to traverse, the Lord Chancellor directed one of the masters of the court to act as committee and to oppose the traverse, which he did by the General Solicitor for minors and lunatics. The traverse was successful. It was held that C. was not entitled to have the receiver discharged without providing for the costs of the General Solicitor incurred in his case. Now, by the Lunacy Regulation Act of 1862, provision is made for the payment of costs in lunacy proceedings, notwithstanding a successful traverse of the finding.

§ 81. In the American courts the same equitable considerations which influence the discretion of the court in regulating the costs upon commissions of lunacy obtain also in the matters of petitions for supersedeas or traverse of the commission.2 Thus where the wife of a lunatic, so found by inquisition, petitioned for the removal of the committee, upon the ground of fraud and mismanagement in the execution of his trust, and upon the hearing it appeared that the committee had faithfully discharged his duty and no probable cause for the application was shown, the petitioner was denied costs out of the estate; but the costs of the committee were allowed him.8 It would seem, generally, where a traverse of an inquisition has been had, having been instituted in good faith by parties in interest other than the supposed lunatic himself, that costs may be awarded out of the estate both to the committee and the petitioner for the traverse. And the rule obtains whether or not the traverse is successful. the court in New York held that where leave was granted to traverse an inquisition against an habitual drunkard, and the finding of the inquest was confirmed, the costs might be charged, in behalf of the petitioner, on the estate of the drunkard, not to exceed \$25, out of which sum the expenses of the committee should first be paid.4 But where, on the petition of a relation of a lunatic who had received from him a deed of a farm a few days before the finding of the inquisition of

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¹ Crosbie, in re, 11 Ir. Ch. 432.

² Clapp, in re, 20 How. Pr. 385; Beckwith, in re, 3 Hun, 443.

^{*} Lytle, in re, 3 Paige, 251.

⁴ Van Cott, in re, 1 Paige, 489; and see Tracy, in re, id. 580.

lunacy, an issue was awarded to try the fact of lunacy, and the party on the trial was found to have been a lunatic for several years preceding, the party traversing the inquisition was ordered to pay the costs.¹ In a case where the fact of lunacy had been satisfactorily established in the first instance, and the opinion of the court, after repeated applications of the party for a discharge of his committee, remained unchanged, the trial of the question was directed to be at the expense of the lunatic or his friends, and not at the charge of his estate, which consisted of personal property only, acquired by the industry and skill of his wife, and barely sufficient for the maintenance of herself, children, and husband.²

- ¹ Folger, in re, 4 Johns. Ch. 169.
- ² M'Clean, in re, 6 Johns. Ch. 440.

CHAPTER IV.

OF COMMITTEES OR GUARDIANS OF INSANE PERSONS.

§ 82. As it is within the discretion of the court to refuse to issue a commission of lunacy in any case, so upon the return of an inquisition pronouncing the party insane the question whether a committee or guardian shall be appointed is to be determined in the sound judgment of the court. Thus upon a verdict of a jury, under a commission, finding a deaf and dumb person to be insane, Chancellor Kent refused to appoint a committee.1 And it is held that where there is a doubt of the insanity of one who has been duly found a lunatic, he should be apprised of that fact and of the Chancellor's readiness to hear any communications from him or in his behalf.2 Since the whole matter of the appointment of a committee rests in the discretion of the court, it follows that no order made in such matter can be the subject of an appeal.8 A different rule, however, prevails in those states where the proceedings in lunacy are had upon a petition to a court of probate jurisdiction praying for the appointment of a guardian for the party on account of his alleged insanity. In such cases the subject of the petition may have the benefit of an appeal, as in ordinary probate proceedings.4 Such appeal, an issue for a jury being framed thereon in the appellate tribunal, may be considered equivalent, as preserving the constitutional rights of the party, to a traverse of lunacy proceedings in the courts of equity. It is held in England that the power of the

- ¹ Brower v. Fisher, 4 Johns. Ch. 441.
- ² Morgan's Case, 3 Bland's Ch. 332.
- * Willis v. Lewis, 5 Ired. 14. But see Castleman v. Castleman, 5 Dana, 55.

In Coleman's Case, 4 Hen. & Mun. 506, it was ordered on the petition of W. C., whose wife, a lunatic, had been put under the care of a committee by the county court, that she should be restored to him upon his entering into bond and security according to law, for that purpose.

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* See § 78, ante.

Chancellor to appoint a committee cannot be controlled by a testamentary devise of the custody of the supposed lunatic; but, on the other hand, the power of the Chancellor will not override a power which the law regards as inherent in an individual. Thus a father has a right to appoint a guardian for his insane child until such child reaches the age of twenty-one. The same rule is doubtless to be applied in the appointment of guardians for the insane in the courts of probate or common law.

SECTION I.

WHO MAY BE COMMITTEE OR GUARDIAN.

§ 83. It was formerly a rule in the English court that the custody of the lunatic's person should not be committed to his heir-at-law, since the latter would have a direct interest in the death of the lunatic.2 This rule, however, was not applied to cases in which the proposed committee was of the next of kin, but not the heir-at-law, for the somewhat artificial reason, that since the next of kin would come in for a share of the lunatic's personal estate under the statute of distributions, it would be for his interest to prolong the lunatic's life so that the personal estate might be increased. This rule, however, no longer obtains, and not only are the relatives of a lunatic preferred in the appointment of his committee,4 but it is held that the heir and next of kin are entitled as of right to propose themselves for the office, although any other person must obtain an order for the purpose, and his petition must state particularly existing objections to the appointment of the heir and next of kin.5 But it is not a matter of course to commit

- ¹ Ludlow, ex parte, 2 P. Wms. 635; and see Booth, in re, 15 L. T. 429.
- ² Ludlow, ex parte, ubi supra.
- Neal's Case, 2 P. Wms. 544.
- * Cockayne, ex parte, 7 Ves. 591; Cope's Case, 2 Ch. Cas. 239; Dormer's Case, 2 P. Wms. 262; La Heup, ex parte, 18 Ves. 221; Richards, ex parte, 2 Brev. (S. C.) 375; Colvin, in re, 3 Md. Ch. 278.
- Persse, in re, 1 Molloy, 439; Hussey, in re, id. 226; Livingston, in re, 1 Johns. Ch. 436. In Webb, in re, 2 Phillips, 10, the lunatic's natural daughter was allowed to carry in proposals for committees both of the estate and person of the lunatic.

the guardianship of the estate of a lunatic to those who are presumptively entitled to it as his heirs or next of kin. These will be appointed the committee of the lunatic's estate when it appears that they are the persons who are most likely to protect the property from loss, and to promote the lunatic's personal welfare and happiness. And in England the court has even refused to appoint the eldest son and heir of the lunatic to be one of the committee of his estate without security, unless it should appear that no other person could be found to act as such committee who would give security.

§ 84. The appointment of a stranger to be committee of the person and estate of a lunatic, without the request of the relatives and next of kin of the lunatic, without an order of reference, and without notice to the persons having a prospective interest in the estate, is held not to be authorized by the practice of the courts in New York. But it is said that if the next of kin unite in a petition and name a proper person as committee, or give their consent in writing to the appointment of a particular person, it is usual to select such person. If the next of kin have not assented, or united in the petition, there should be an order of reference, and then the next of kin are entitled to notice of the proceedings upon the reference, and to propose themselves as the committee. But where the mother of one alleged to be an idiot applied to have her

¹ Taylor, in re, 9 Paige, 611.

² Page, in re, 7 Daly, 155. Where the father of the lunatic was living and had the custody of the lunatic's estate, it was held that he ought to be appointed committee on giving proper security. Coleman v. Commissioners, 6 B. Mon. 239.

^{*} Frank, in re, 2 Russ. Ch. 450. Under the English practice, the first inquiry for the purpose of appointing a committee is made by a master in lunacy. The master is furnished with evidence in support of the petition for appointment, and reports his conclusion to the court. Pope, Lun. 93, 94. And it has been held that, in order to defeat the appointment of a person whom a master had approved for the office of receiver of a lunatic's estate, it should be shown that such person was incompetent, not merely that another was more eligible; and on this ground the court refused to send back for review the report approving such a person on the application of the sister and some of the next of kin of the lunatic. Lord Bangor, in re, 2 Molloy, 518.

⁴ L'Amoree, in re, 32 Barb. 122.

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declared non compos mentis, and this having been done, the mother made application to have a committee of the person and estate of the idiot appointed, and upon her consent the clerk of the court was appointed, whereupon a sister of the idiot applied to have the order appointing the committee vacated, on the ground that she had not had notice of the proceedings, it was held that the proceedings were regular without notice to the sister, and that, as there was no personal objection to the committee, he would not be removed, especially as the court was satisfied, on an examination of the proceedings, that they were had in good faith and were for the benefit of the idiot.¹

§ 85. In the appointment of the committee of the person of a lunatic, the court will regard, as far as it is possible and proper so to do under the circumstances, the wishes and inclinations of the lunatic himself.² And a person whose residence and occupations permit his frequently visiting the lunatic and superintending his affairs is ordinarily preferred as committee.³ Thus a non-resident of a state in which a lunatic resides should not be appointed his committee,⁴ since the committee ought to be resident within and amenable to the jurisdiction of the court.⁵ So it is held that the practice of appointing a master of the court to be committee of the estates of lunatics is objectionable, since he can have no direct knowledge of the lunatic and his affairs, and the purpose of the office is to acquire direct knowledge and interfere actively

- ¹ Owens, in re, 5 Daly, 288. See Page, in re, 7 Daly, 155.
- ² Leacocke, in re, Lloyd & Gould, 498. In Maryland, it is said that although it is usual to appoint as committee a person nominated by the party suing out the commission, yet a caveat may be entered against such an appointment. Colvin, in re, 3 Md. Ch. 278.
 - * Fermor, ex parte, Jacob, 404.
- 4 Boarman's Case, 2 Bland's Ch. 89; Morgan's Case, 3 Bland's Ch. 832. And it is not the practice to appoint a person resident abroad to be guardian ad litem of a lunatic. Hartland v. Atcherly, 7 Beav. 53.
- Ord, ex parte, Jac. Ch. 94. Accordingly, in this case, an allowance made to the committee for expenses in visiting the lunatic was discontinued upon the committee going to live in Scotland. But the fact that the committee resides at a distance from the lunatic is not, per se, a ground for his discharge. Brown, in re, 1 Mac. & G. 201.

in the management, and generally to guard the safe exercise of the jurisdiction.1 And it is said that if the lunatic be a female, it is generally most proper to appoint a female committee to take charge of her person; and that in some other cases the comfort of the lunatic may be best promoted by having his person placed under the care of a female committee, as by appointing the wife to be the committee of her husband.2 So where the appointment of guardians for insane persons was vested by law in the probate courts, it was held, when a wife was found insane and the husband was otherwise a suitable person for the trust, that the intimate and confidential nature of the marriage relation rendered it proper that he should be preferred, in the appointment of the guardian, to a third person.⁸ It has been held improper to appoint as receiver of a lunatic's estate one who has acted as solicitor under the commission of lunacy.4 Although it is said to be the more usual to appoint the same person to be committee of the lunatic's person and estate, this course is not necessary or invariable.5

SECTION II.

NATURE OF THE OFFICE.

- § 86. By the theory of the English law the care of the persons and property of lunatics is a trust reposed in the King, who discharges it by a bailiff, which bailiff, or committee, is appointed by the person holding the Great Seal for the time
 - 1 Hussey, in re, 1 Molloy, 226; and see Fletcher, ex parte, 6 Ves. 427.
 - ² Gibson's Case, 1 Bland's Ch. 138.
- Drew's Appeal, 57 N. H. 181. But the husband will not be allowed the custody of the person of his insane wife when it appears that his friendliness towards her is very questionable, and that his motives for seeking to obtain letters are those of self-interest. Feegan's Estate, 1 Myrick's Prob. Rep. (Cal.) 10.
 - 4 Pincke, ex parte, 2 Mer. 452.
- when she was compos mentis, and though she may never be restored to mental capacity so as to revoke it, is still ambulatory until her death, and until then can confer no rights and have no influence on the court in appointing her committee. Ibid.

being by virtue of a warrant under the King's sign-manual.1 But the superintendence of the conduct of the trust thus reposed in the committee is a function, and originates in the authority, of the Court of Chancery, as being the tribunal into which the inquisition is returned and which grants the authority founded thereon. And in the courts of chancery in the United States, the committee of the lunatic appointed by the Chancellor in the exercise of ordinary equity powers is considered as a mere commissioner of the court, administering his trust under the direction of the Chancellor, responsible only to the court, and removable in its discretion like an ordinary receiver.2 In those jurisdictions where the guardianship of insane persons is committed by statute to the probate courts, the duties and liabilities of the guardian are ordinarily assimilated to those of the guardians of minors.³ Thus in Vermont it is held that the guardian of an insane person, appointed under the statute, becomes substituted by his guardianship for his ward with reference to all his interests to act for him in the management of his property, and to fix the locality of his person and determine his domicile.4 But the guardian of an infant being appointed solely by reason of his ward's infancy, such a guardian cannot, after the ward attains his majority, continue to act under his original appointment by reason of the insanity of his ward.6

- § 87. When a person found insane stands in the relation of cestui que trust to another who already holds the legal title to property the beneficial interest in which is in the lunatic, the committee or guardian of the insane person will not, by the mere fact of his appointment, be substituted for the trustee and so entitled to the legal possession and control of such
- ¹ Fitzgerald, in re, 2 Sch. & Lef. 432. The committee will not, in managing the estate, except in special cases, be held to act under the advice of the master to whom the reference in lunacy has been made. Cooper, in re, 1 Myl. & C. 33.
 - ² Bolling v. Turner, 6 Rand. (Va.) 584.
 - * Stumph v. The Guardianship of Pfeiffer, 58 Ind. 472.
- ⁴ Anderson v. Anderson, 42 Vt. 350; Gen. Sts. Vt. c. 72, § 49; Rev. Laws, § 2445.
 - Fleming v. Johnson, 26 Ark. 421.
 - Coon v. Cook, 6 Ind. 268.

property. And this rule obtains even in those states where the committee appointed by the court is considered to be invested with such a possessory title to the property of his ward as will enable him to alienate it, or to maintain or defend suits in respect of it. Thus the courts in Pennsylvania hold that the committee under such circumstances has no right to the control of the trust property; 2 and it was further held in the same state, where property vested by testamentary appointment in a trustee, that the latter could hold the corpus of the estate although the cestui que trust had already been declared insane and a committee appointed.8 But it was held that, in such a case, the committee was entitled to receive the income, to be applied for the maintenance of the lunatic.4 So where real estate was devised to a lunatic, the executors to take charge of it merely in order to prevent its alienation by the lunatic, and not in trust generally, it was held that the committee of the person and estate had the right to receive the income.⁵

§ 88. The committee of the lunatic's estate is required, generally, to give security for the proper performance of his duties.⁶ But a court of chancery may in proper cases dispense with such security.⁷ Under the English practice, the bond of the committee is made to run to the crown,⁸ and the crown is entitled to treat it as a matter of record, and in case of a breach to have a scire facias thereon.⁹ In New York such bonds are made payable to the People of the State, or to the register or clerk of the court in whose office they are filed.¹⁰ In those states where the jurisdiction in

- ¹ Canaday v. Hopkins, 7 Bush (Ky.), 108.
- ² Wilson's Estate, 2 Penn. St. 325.
- * Earp's Estate, 2 Pars. 178.

4 Ibid.

- ⁵ Royer v. Meixel, 19 Penn. St. 240.
- ⁶ Frank, in re, 2 Russ. Ch. 450.
- ⁷ Burroughs, in re, 1 Con. & Laws. 309; s. c. 2 Dru. & War. 207.
- ⁸ Bull, in re, 2 Cooper, 63.
- Rex v. Lambe, M'Cle. 402; Regina v. Chambers, 11 M. & W. 776. Under the Lunacy Regulation Act of 1853 the committee may bring into court an adequate sum in money or stocks, which security will be substituted in the place of a bond with sureties.
 - ¹⁰ White, in re, 1 Barb. Ch. 48.

lunacy matters is committed to the courts of probate, the bonds of guardians appointed for insane persons are generally similar in their tenor and conditions to those required from the guardians of minors.¹ Upon the supersedure or successful traverse of the commission in lunacy, or equivalent proceedings, the security given by the committee will be discharged upon a proper account being rendered.²

SECTION III.

COMPENSATION AND ALLOWANCES.

- § 89. Under the English practice the committee, ordinarily, receives no compensation for his services, as such; 8 and if any allowance is made to the committee, it is not on his own account, but for the benefit of the lunatic's estate, as when rents cannot be collected without assistance.4 But it is considered by the English court that the committee of the person of the lunatic is entitled to the savings out of the sum allowed for the lunatic's maintenance, and that such savings do not form a part of the lunatic's personal estate.⁵ The committee will not, ordinarily, be held to an account for the unexpended balance of such an allowance. But an account may be ordered under special circumstances, as when the lunatic has been improperly cared for, or the sum allowed has, clearly, not been expended honestly for his benefit.6 Thus where orders were made increasing the former allowance for the lunatic's support, with the apparent intent of
- ¹ Under the Civil Code of Louisiana, it is held that the court has discretionary power in fixing a curator's bond at such further sum as to cover possible loss by maladministration, after first, in compliance with the law, making it equal in amount to the active debts and to the money and movables stated in the inventory. Rochon's Interdiction, 15 La. Ann. 6. See Woodward v. Woodward, id. 162.
 - ² Bumpton, ex parte, Moseley, 78.
 - * Annesley, in re, Ambl. 78; Anon., 10 Ves. 103.
- ⁴ Walker, in re, 2 Phillips, 630. And in Westbrooke, in re, id., an allowance, not exceeding five per cent of the annual receipts, was permitted to the committee for his expenses in collecting rents.
 - ⁵ Grosvenor v. Drax, 2 Knapp, 82; Ponsonby, in re, 5 Ir. Eq. 268.
 - ⁶ French, in re, L. R. 8 Ch. App. 317.

creating a balance for the benefit of the committee of the estate, such orders were set aside as having the effect, indirectly, of allowing compensation to the committee of the estate in that character. Under peculiar circumstances, a salary has been allowed to the committee of the estate; and it is competent for the committee, in cases of necessity, to employ suitable agents to superintend the details of the management of the lunatic's property. When such an agent is employed from year to year, he may be allowed a fixed salary, to be paid him out of the rents. In a case where no suitable person could be found to act as the committee of a lunatic's estate, the court appointed a receiver of the property, to be considered as standing to the lunatic in the relation of, and to give security in the same manner as, a committee, but to receive a salary for his services.

- § 90. In the United States the courts of chancery ordinarily allow to the committees of insane persons such reasonable compensation as would be allowed to trustees, guardians of minors, or executors, in like circumstances. So in South Carolina it was held that the committee was entitled to a commission of five per cent upon funds of the lunatic received and disbursed, the committee being to all intents a trustee, and this being the compensation allowed trustees under the statute. And the same rule obtains in those jurisdictions
- ¹ Latouche v. Danvers, Lloyd & Goold, 503. And a committee of the estate and person may be appointed, with the restriction that he shall not receive any part of the estate. Billinghurst, ex parte, Ambl. 104. In Langham, in re, 2 Phillips, 299, the committee was disallowed the excess remaining over a sum allowed for repairs, although the repairs were beneficial to the estate.
- ² Fermor, ex parte, Jacob, 404. If an allowance is made, it is for the benefit of the estate, and in no case is it made willingly. Ibid. See Lanesboro, in re, Beatty, 638.
 - * Brown, in re, 1 Mac. & G. 201.
 - ⁴ Errington, in re, 2 Russ. Ch. 567.
- Warren, ex parte, 10 Ves. 622; Radcliffe, ex parte, 1 Jac. & W. 639. For a discussion of the allowance of credits and charges, as between a receiver of a lunatic's estate and a committee subsequently appointed, see Beall v. Smith, L. R. 9 Ch. App. 85.
- ⁶ Livingston, in re, 9 Paige, 440; s. c. 2 Denio, 575; Roberts, in re, 8 Johns. Ch. 43.
 - ⁷ Lyde, ex parte, Rich. C. C. 3.

where the custody of the persons and estates of insane persons is committed to guardians appointed by the courts of probate or common law. Thus in Massachusetts the guardian of an insane person has been allowed compensation for services in the personal charge of his ward at the rate of one hundred dollars per month, the charge appearing to be justified by the circumstances of the particular case, and further compensation, at the rate of five per cent upon the income collected. But the court, upon the principles applied, generally, to the settlements of guardians' accounts in Massachusetts, declined to allow compensation, in the shape of a commission, upon amounts expended or reinvested by the guardian.¹

§ 91. The allowance of costs and charges incurred by the committee or guardian of an insane person would appear to rest, largely, within the equitable discretion of the court.2 It was established as the rule in an early case that the committee should not be allowed for buildings erected or improvements made by him upon the lunatic's estate.8 But in a late case occurring in Massachusetts it was held that the guardian of an insane person was entitled to charge his ward's estate with a reasonable yearly rent for a building erected by the guardian upon the ward's land, such erection being of great advantage to the proper administration of the property.4 Since the guardian or committee cannot settle with himself for the tort of his ward, it is held that he cannot, in his account, be allowed for damages occasioned to his own property by his ward's want of care, but that he must seek his remedy by an action against the insane person or his

¹ May v. May, 109 Mass. 252.

² Calton, ex parte, 1 Ves. 156; Clark, ex parte, id. 196; Colvin, in re, 4 Md. Ch. 126; Bulows v. Committee of O'Neal, 4 Desauss. 394. But see Montgomery, in re, 1 Molloy, 419. In this case the receiver of a lunatic's estate having proceeded, for the supposed benefit of the lunatic, in a wrong form of action, abandoned it and adopted another form of action, in which he was successful. He was refused the costs of the abandoned action, although the master reported that he had acted in good faith and ought to be allowed the costs.

^{*} Foster v. Marchant, 1 Vern. 262.

⁴ Murphy v. Walker, 131 Mass. 341.

representative after the termination of his own trust.¹ It is held that the reasonable expenses incurred by the guardian of an insane person in resisting the application for a revocation of the guardianship on the ground of his restoration to sanity, when it admits of any reasonable doubt and the guardian appears to have incurred the expenses in good faith, for the purpose of a proper inquiry into the condition of his ward, are to be allowed to the guardian in the settlement of his account.²

SECTION IV.

ACCOUNTS AND RESPONSIBILITY.

§ 92. The duty of the committee consists not merely in his obligation to attend to the management of the estate, but also in the obligation to keep the court informed of all that materially relates to the estate, and of the nature of the charges affecting it. So in the English Court of Chancery the committees are required from time to time to render accounts of their receipts and payments in respect of the lunatic's estate. By a rule of court, such accounts are to be rendered annually; but when the estate is so small as to make the expense of an annual accounting burdensome, it may be dispensed with, by order of the court. In the absence of such an order, it is within the discretion of the court to charge the committee with interest upon the annual balances retained in his hands for which he has failed to account. And a committee neglecting to pass his accounts regularly will not, generally, be

- ¹ Brown v. Howe, 9 Gray, 84.
- ² Palmer v. Palmer, 38 N. H. 418.
- * Skingsley, in re, 3 Mac. & G. 221.
- ⁴ Shelf. Lun. 171; General Orders in Lunacy, 1853, 15. The accounts of the committee are referred to a master upon proper order. Ibid. In Tharp v. Tharp, 3 Mer. 510, Lord Eldon permitted the next of kin of the lunatic to come in at the accounting before the master with costs; not on account of any interest of theirs in the estate, but to assist the court in the care of the lunatic's interests.
- ⁵ Pickard, ex parte, 3 Ves. & Bea. 127; Anon., 1 Russ. & Myl. 113; Shelf. Lun. 171, 172.
 - ⁶ Hall, ex parte, Jac. Ch. 160.

allowed his costs.¹ It is to be observed, as has already been stated, that the committee of a lunatic is regarded by the English court sitting in lunacy as a mere bailiff of the crown, having no interest in the lands of his ward.² On the other hand, he is regarded by the Court of Chancery, to which court his accounts are rendered, as a trustee, and is amenable in like manner as other trustees.⁸

§ 93. In the United States, it is apprehended that where conservators, guardians, or curators of insane persons are appointed by the courts of probate jurisdiction, the liability of such officers in respect of their accounts is similar to that of the guardians of minors. Thus in North Carolina, under Rev. Sts. c. 54, § 13, it was held that guardians of lunatics were responsible for compound interest in the same manner and to the same extent as guardians of infants, and that, in like manner, bonds payable to them as guardians would bear compound interest.4 And where the custody of insane persons remains with the courts of chancery, the duty of their committees to account is, generally, like that of receivers or trustees in equity.⁵ It is held that a committee of the person and estate of a lunatic may be appointed without liability to account, upon the committee undertaking to maintain the lunatic properly and to return an inventory of his estate.6 And where the court considered that the committee took the estate of the lunatic to use as his own, it was held that he was liable to account only upon the call of the court. Thus, upon the principle adopted by the court, it was held that expenses incidental to the trust and to the possession of the property, as of the birth and raising of young negroes belonging to the estate, ought not to be allowed to the committee.7

- ¹ Clarke, ex parte, 1 Ves. 296.
- Thus he has in England no further power of distraint than a receiver. Shelf. Lun. 250; Pope, Lun. 129, 149. A different rule prevails in those states where (see § 32, ante) the committee is vested with a legal estate in his ward's lands.
- * Sheldon v. Aland, 3 P. Wms. 104; Wright v. Chard, 1 De G. F. & J. 567.
 - ⁴ Spack v. Long, 1 Ired. Eq. 426.
 - See Story Eq. Jur. §§ 465, 512.
 - 6 Boarman's Case, 3 Dland's Ch. 89.
 - ⁷ Moore v. White, 4 Harr. & J. 548.

§ 94. In the allowance and settlement of the annual or final accounts of the committees or guardians of insane persons, equitable rules will be applied. Thus such persons will not be permitted to make any profit for themselves out of the concerns of their trust.1 On the other hand, they will not be liable for losses to the trust, occurring in the discharge of its administration, unless they have been guilty of negligence, malversation, or fraud.2 Upon the application of these principles, it is held that, if the committee make a profit for himself out of the labor of the lunatic, he becomes chargeable for such profit, and his successor in the office of committee may recover it in an action for an account without joining the lunatic as a party. And the committee of a lunatic is chargeable for loss of rents and profits sustained by his letting out lands of the lunatic without security, to one who proves insolvent, unless it appear that the party was solvent and of good credit at the time of the letting, which fact it is for the committee to prove. Although as a general rule the committee is to be charged with simple interest upon the balances found against him upon the settlement of his accounts, he will not be liable for interest upon moneys for delay in the transfer of which he is not responsible, as where he is obliged to hold such moneys pending controversies between creditors as to their disposition.6 Where a committee of the lunatic's estate, in 1864, obtained leave of the court to invest funds of his trust in bonds of the Confederate States, and thereupon deposited the funds in the hands of the proper officer and took a certificate entitling him to receive a bond, which it did not appear was ever issued, and the deposit was lost, the committee was held accountable for the money.7 It has been said, in Eng-

¹ But see § 89.

See Story Eq. Jur. § 465.

^{*} Ashley v. Holman, 15 S. C. 97. In Hardin v. Smith, 7 B. Mon. 390, it was held that the heir or administrator of the committee of a lunatic might be sued in any circuit in which he was found by the lunatic's representative, the jurisdiction not being confined to the circuit where the custody of the lunatic belonged.

⁴ De Treville v. Ellis, Bailey Eq. (S. C.) 35.

⁵ Crigler v. Alexander, 33 Gratt. 674.

⁶ Bulows v. Committee of O'Neal, 4 Desauss. 394.

⁷ Cole's Committee v. Cole's Administrator, 28 Gratt. 865.

land, that the property of lunatics should be invested only in government securities, except under peculiar circumstances.¹ An investment has been authorized of funds belonging to a lunatic in a life annuity for his benefit.²

§ 95. It is considered, upon principles hereafter stated, that the guardian or committee of an insane person cannot, without leave of court, charge the estate by way of security for loans made to him for the benefit of his ward.8 And since a committee or guardian, if he sign an obligation as such, cannot be sued on such obligation in his official capacity so as to make the estate of his ward liable to be taken in execution, he will be personally liable upon such obligation, even after the termination of his office; for if he was ever liable to suit he must continue liable, notwithstanding the discharge of his guardiauship.4 The moneys raised in good faith upon such obligations are chargeable to the estate in the guardian's accounts; 5 and it would seem that if, after the termination of the guardianship, the guardian is adjudged liable for such moneys, he may look for their reimbursement to his former ward or the legal representatives of such ward. Upon the principle which discourages any change in the nature or succession of the estate, it is held that committees of insane persons have no authority, without leave of court first obtained, to expend sums in draining or other improvements of the real estate, or to consent to the construction of a railway through the land of the lunatic. But such acts, if done in good faith, are not necessarily ground for discharging the committee.6 Where the committee of a lunatic permitted a debt due to his ward to be used as part of the assets of a

¹ Ellice, ex parte, Jac. Ch. 234.

² Dodsworth's Trusts, in re, 10 Hare, 16.

See § 109. In Louisiana it is provided by the Civil Code, arts. 12, 808, 432, that the curator of an interdicted person cannot borrow money for such person without the authority of the judge, granted on the advice of a family meeting; and it further declares that whatever is done in contravention of its prohibition is void. Hardoin's Succession, 18 La. Ann. 24.

⁴ Thacher v. Dinsmore, 5 Mass. 299.

⁵ Ibid.

⁶ Brown, in re, 1 Mac. & G. 201.

partnership in which the debtor was a partner, the partnership assuming the debt, it was doubted whether the committee had the power, or whether the Lord Chancellor could have given him the power, thus to convert the separate liability of the original debtor into a joint liability.

§ 96. The settlement of accounts, as between the insane person or his representatives and his guardian or committee, is to be made in the court having jurisdiction of the proceedings in lunacy, and forms a part of such proceedings. it was held that the court would not entertain a bill in equity brought against an insane person by his guardian for a settlement of the guardian's accounts and the payment to him of any balances due, the proper method of proceeding being by a petition filed by the guardian.2 The accounts of the committee or guardian being allowed, and proper judgment entered for the payment of balances appearing on the accounts, such balances are to be taken, prima facie, as correct,8 and the payment of them may be enforced in an action at law.4 In a case where the guardian of an infant became insane before settling his accounts, it was held that the Probate Court might direct a settlement to be made by his guardian, proceedings to be conducted in the name of the insane guardian by his guardian, and that a decree for a balance found in favor of the infant should be rendered against the insane guardian individually, the amount of the balance to be satisfied out of his goods and chattels in the hands of his guardian.5 The guardian of an insane person cannot be adjudged the

- ¹ Parker, ex parte, 2 Mont. Deac. & De G. 511.
- ² Tally v. Tally, 2 Dev. & Bat. Eq. 385.
- * In Beecroft's Curatorship, 28 La. Ann. 824, it was held, that a curator's accounts, being filed and homologated by judgment, are, prima facie, correct; but may be impeached and shown to be erroneous, whereupon the court will correct them. See Civil Code La. art. 356.
- 4 In Shepherd v. Newkirk, Spencer (N. J.), 343, it was held that an action would not lie on a decree of the Orphan's Court to recover the balance declared by such decree to remain in the hands of a lunatic's guardian, the proper remedy being by an action for money had and received. It is apprehended that, ordinarily, in the United States, the remedy to recover such balances remaining unpaid will be by an action upon the official bond of the guardian or committee.
 - Modawell v. Holmes, 40 Ala. 391.

trustee of his ward, in a process of foreign attachment, until his account has been finally adjusted and a balance in favor of his ward found in his hands.¹

SECTION V.

TERMINATION OF THE OFFICE.

- § 97. The English cases hold that upon the death of the lunatic the jurisdiction in lunacy terminates, and no order can be made afterwards, except as incidental to the general authority of the court to compel an account and take the funds of the lunacy into safe custody.2 And the jurisdiction to compel an account is exercised by the court sitting in chancery, and a petition for that purpose, presented by the personal representative of the deceased lunatic to the Lord Chancellor sitting in lunacy, cannot be maintained.³ Thus a motion, made in lunacy by the committee, after the lunatic's death, for a reference to ascertain his next of kin in order to the distribution of the money of the lunacy in the committee's hands, was refused; the court saying that such a reference could only be had upon a bill in chancery against the committee for an account.4 But an order made in a lunacy matter may be carried into effect when the lunatic dies after the issuing of the order, unless its execution will affect adversely
 - ¹ Davis v. Drew, 6 N. H. 399.
- Barry, in re, 1 Molloy, 414; Way, in re, 8 De G. F. & J. 175. After the lunatic's death, chancery will not administer the fund even for the benefit of creditors; they must pursue their remedies before the ordinary jurisdictions; nor will the court adjudicate questions of right between opposing claimants. Colvin, in re, 3 Md. Ch. 278; Boarman's Case, 2 Bland's Ch. 89.
- * Wigg v. Tiler, 2 Dick. 552; Grosvenor v. Drax, 2 Knapp P. C. 82; Scammell v. Light, 4 Giff. 127.
- ⁴ Gilbert, ex parte, 1 Ball & Beatt. 297. In Clarke, ex parte, Jac. Ch. 589, the court held that there was no jurisdiction in lunacy after the death of the lunatic to try the question of heirship; but, this being a case of disputed heirship, that the possession should, under the circumstances, be given to the parties reported by the master to be the heirs-at-law.

the interests of the succession.¹ Thus where the lunatic died after a reference ordered to ascertain the nature and amount of his property and before the master's report in the matter had been filed, the court directed the reference to be proceeded with notwithstanding the lunatic's death.²

§ 98. The death or recovery of the lunatic ordinarily terminates the office of the committee or guardian; and it is further held, where two or more are appointed to be committee of a lunatic, that the trust is terminated upon the death of any one of them.⁸ In case of the lunatic's recovery, duly ascertained, it is the duty of the committee to turn over to his ward all the estate of the latter remaining in his hands; and in case of his failure to make return he will be liable, upon the termination of his trust, to a suit at law for sums remaining in his possession.⁴ And upon the lunatic's death the court of chancery will order the personal estate to be passed over to the representatives of the deceased.⁵ But as it is the

¹ Kingston, in re, 2 Ir. Rep. Eq. 169.

- ² Singleton, ex parte, 8 Ir. Ch. 263. In a case where a lunatic died intestate, a reference was made to a master to inquire and report the nature and amount of the property possessed by the lunatic at the time of his death, and who was his heir-at-law and next of kin, and to take account of his debts, funeral expenses, and money expended on his maintenance, and other accounts of a complicated nature. All the parties interested in the assets of the lunatic having entered into a consent whereby provision was made for the distribution of the assets amongst the persons entitled, without taking accounts, and without any report of the master, the Lord Chancellor made this consent a rule of court, and made an order in accordance with its terms. Rowles, in re, 15 Ir. Ch. 562. Petitions presented in lunacy matters, after the death of the lunatic, should allege the fact of death. Briscoe, in re, 2 Drury & Warren, 501.
 - Boarman's Case, 2 Bland's Ch. 89.
 - 4 Shepherd v. Newkirk, Spencer (N. J.), 343.
- Same v. Same, 7 Md. 282; Stumph v. Guardianship of Pfeiffer, 58 Ind. 472. For a case in which the heirs-at-law of a deceased lunatic were admitted to except to the accounts of the trustee of the lunatic, the attorney in fact of the trustee who had acted for him and passed the accounts being the administrator, see Vinson v. Vinson, 1 Del. Ch. 120. In Paradise v. Cole, 6 Mun. 218, the court was inclined to the opinion that a suit against the committee of an insane person might properly be revived,

duty of one who was the committee of the estate of a lunatic to take care of the estate after the death of the lunatic, for the benefit of the heirs, he may rightfully retain possession until ordered by the court to give it up; and he acts at his peril if he gives it up without such order. In Georgia it is provided that the guardian of a deceased lunatic shall be vested with all the powers of an administrator of the estate, and shall be controlled by the laws in force relating to administrators.

- § 99. It is believed that, generally, in the United States, the committee, trustee, or guardian of an insane person, having accepted the office, may decline to continue to act as such.³ But in New York it has been held that a committee who has voluntarily accepted his appointment cannot be discharged without showing some valid excuse for resigning the trust; and that the fact that his situation is rendered unpleasant, in consequence of controversies existing between different members of the lunatic's family, is not sufficient reason for discharging him on his own petition.⁴
- § 100. It is within the discretion of the court appointing him to remove the committee, upon good cause shown,⁵ and to appoint another in his stead, and the order of the court

as against the administrator of such person, in the event of the death of the lunatic during the pendency of the suit.

- Guerard v. Gaillard, 15 Rich. 22; Colvin, in re, 3 Md. Ch. 278; Fitzgerald, in re, 2 Sch. & Lef. 439; Shelf. Lun. 210. For a case in which the appointment of an administrator of a deceased lunatic and payment to him by the committee were presumed, after the lapse of twenty-seven years, see Willingham v. Chick, 14 S. C. 92. Under the English practice it was held that notice of a petition by the lunatic's executors, for the payment to them of a balance paid into court by the committee, must be served upon the committee, although the latter had passed in his accounts and his sureties had been discharged. Wylde, in re, 5 De G. M. & G. 25. Where a lunatic was a tenant for life of lands which were underleased for his benefit, it was held that upon his death his committee could not enter upon the premises to distrain for the arrears of the proportioned rent. Persse v. Persse, Alcock & Napier, 85.
 - ² Code, Ga. § 1804; Jefferson v. Bowers, 83 Ga. 452.
 - ⁸ Morgan's Case, 3 Bland's Ch. 332.
 - 4 Lytle, in re, 8 Paige, 251.
 - Fitzgerald, in re, 2 Sch. & Lef. 436.

for such a removal is not the subject of appeal. And the same power is generally vested in the courts of probate in respect of guardians of insane persons appointed by them.2 Among the causes which in England have been deemed sufficient grounds for removing a committee are failure to visit or properly care for the lunatic,8 neglect or refusal to defend an action commenced against the lunatic,4 neglect in passing accounts or paying money into court according to order,5 or default in furnishing or increasing security for the performance of the duties of the committeeship, as required by the orders in lunacy,6 or contempt of the court having jurisdiction over the lunatic's affairs.7 Fixed habits of intemperance constitute a sufficient reason for the removal of a guardian of an insane person.8 It would seem that the bankruptcy of the guardian or committee of the lunatic's estate is a sufficient, though not a conclusive, reason for his removal; 9 but it is held that the committee of the person need not be removed in consequence of his bankruptcy, since the true question for consideration is whether the committee has done what is required for the bodily and mental comfort of the lunatic, which in many cases is best promoted by leaving the custody of the person in the hands of the committee. 10 Since the court

- ¹ Griffin, in re, 5 Abb. N. s. 96.
- ² But under the Civil Code of Louisiana, arts. 887, 898, it is held that the court cannot rescind the appointment of a curator for an insane person, without good legal cause shown. State v. The Judge, &c., 18 La. Ann. 523.
 - ⁸ Proctor, ex parte, 1 Swanst. 531.
 - 4 Lloyd v. —, 2 Dick. 460.
 - 5 Lockey, in re, 1 Phillips, 509.
 - Gen. Orders, 1853, 21.
 - 7 Jones, ex parte, 13 Ves. 237.
- * Kettletas v. Gardner, 1 Paige, 488. And it is held in the same case that the wife of a guardian so removed should not be appointed in his place, since she is presumed to be subject to his control.
 - Shelf. Lun. 233, et cit.
- 10 Mildmay, ex parte, 3 Ves. 2; Proctor, ex parte, 1 Swanst. 531. In Chew, in re, 4 Md. Ch. 60, it was held that if the committee of the person and estate of a lunatic has given a well-secured bond, and is in other respects fit to have the custody and estate of the lunatic, his insolvency in fact is not a cause for his removal. In this case the court distinguish

requires the committee of the person to reside within its jurisdiction, his going permanently beyond it would seem to be a sufficient cause for removing him.¹

the facts from those in Mildmay, ex parte, ubi supra, in that the committee in the latter case had taken the benefit of the insolvent laws, which he had not done in the case before the court.

1 Ord, ex parte, Jac. 94.

CHAPTER V.

OF THE OFFICIAL MANAGEMENT OF THE ESTATES OF INSANE PERSONS.

SECTION I.

OF EXPENDITURES FOR THE LUNATIC'S PERSON.

§ 101. In the management of the estates of insane persons, the first and paramount rule is to provide for the personal ease and comfort of the lunatic. The second and subordinate rule is not to vary the nature of the property so as to affect the right of succession.1 Applying these rules, it is held that a liberal application of the lunatic's property is to be made, so as to secure to him every comfort his situation will admit of.2 And the annual sum to be applied to the maintenance of the lunatic is not of necessity limited to the amount of the income.8 But the guardian or committee of an insane person has no authority, without the permission of the court, to expend a sum exceeding the annual income of the estate in expenditures for and on account of his ward.4 It is said, however, that no probable expense should deter the court from directing to be done whatever appears to be most advantageous for the lunatic, without regard to the interests of the next of kin.⁵ Thus a lunatic may be permitted to travel within the jurisdiction of the court, proper

¹ Weld v. Tew, Beatty, 266.

² Baker, ex parte, 6 Ves. 8; and see Chumley, ex parte, 1 Ves. 296; Brodie v. Barry, 2 Ves. & Bea. 39; Rudland v. Crozier, 2 De G. & J. 143. So, by the French Civil Code, 510, "Les revenues d'un interdit doivent être essentiellement employés à adoucir son sort, et à accélérer sa guérison."

^{*} Persse, in re, 3 Molloy, 94.

⁴ Patton v. Thompson, 2 Jones Eq. (N. C.) 411; Kennedy v. Johnson, 65 Penn. St. 451.

⁵ Colah, in re, 8 Daly, 529; and see § 110, post.

security being given.¹ And where an East Indian temporarily sojourning in New York had become insane, and it was made to appear to the court, which had appointed a committee of his person, that it would be to his mental and physical advantage to have him sent home to India, this was ordered to be done.²

- § 102. It is considered that the property of an insane person situated within the jurisdiction of his residence is to be applied to his support before resort is had to property situated in a foreign jurisdiction. But it was held, where a lunatic had been supported at the state's expense, that the court might decree, in behalf of the commonwealth, out of the profits of his estate, the past expenses of keeping the lunatic, though residing in a different county from that in which the estate was situated, upon process being served on the lunatic in the county where the suit was brought. It is held, it being the husband's primary duty to support his insane wife, that, notwithstanding she may have sufficient estate of her own, her separate estate is not to be applied to her support until the husband's estate is exhausted.
- ¹ Hackett, in re, 3 Ir. Ch. 375; and see May v. May, 109 Mass. 252. In Jones, in re, 1 Phillips, 461, leave was granted the lunatic to reside in Scotland, his committee undertaking to produce him within the jurisdiction of the court when required.
- ² Colah, in re, 3 Daly, 529. See ch. ix. sec. iii., (a), post, for further instances of things considered necessary and proper to be allowed for an insane person's support. Where one, having been found a lunatic under a commission, was afterwards committed for murder, tried, and acquitted on the ground of insanity, and the court ordered him to be detained in jail as a dangerous lunatic, under the statute, and a petition was presented by his committee to have certain sums allowed out of his estate for his support and the expense of his defence on the trial, and also that he might be removed from jail to a proper receptacle for lunatics, Eldon, C., said there was a difficulty in the way, but, after consideration, ordered the sums to be paid, with liberty for the committee to make any application they thought proper respecting the lunatic's custody to the King in council. Hill, ex parte, Cooper, 54.
 - * Taylor, in re, 9 Paige, 611.
 - ⁴ Coleman v. Commissioners, 6 B. Mon. 239.
 - ⁵ Meyer's Estate, 1 Myrick, Prob. (Cal.) 178.

SECTION II.

OF THE SUPPORT OF THE LUNATIC'S FAMILY, ETC.

- § 103. The proper maintenance and support of the lunatic being provided for, the income of his property is next to be applied for the benefit of those whom, by law, the lunatic is bound to provide for. This rule is extended to favor the brothers and sisters of the lunatic and their children, and is said by Lord Eldon to rest, not on any supposed interest of these in the property, which cannot exist during the lunatic's life, but upon the principle that the court will act with reference to the lunatic and for his benefit as it is probable the lunatic himself would have acted if of sound mind. But the earlier English cases held that orders for such allowances would be made with great jealousy and reluctance. And a
- ¹ See Foster v. Marchant, 1 Vern. 262. In Haycock, ex parte, 5 Russ. Ch. 154, an allowance was made out of the lunatic's estate for the benefit of his illegitimate children, but was refused to their mother. In Linehan, ex parte, 1 Jones & La T. 29, it was held that the Lord Chancellor had not jurisdiction in lunacy, upon the application of a creditor of the heir-at-law and sole next of kin of the lunatic, to order an allowance made to him out of the lunatic's estate for his support, to be applied in payment of his funeral charges.
- ² Whitbread, ex parte, 2 Mer. 99. Therefore the amount and proportions of such an allowance are entirely in the discretion of the court. Ibid. See Creagh, in re, 1 Drury & Walsh, 323.
- Blair, in re, 1 Myl. & C. 300. In this case, payments out of a female lunatic's income were ordered made to her nephews, under the circumstances. Lord Cottenham observed that he remembered that in Whitbread, ex parte, supra, Lord Eldon felt great difficulty, and repeatedly asked, what power he had to give away the estate of a lunatic. last acceded, and the precedent had been followed in several subsequent The practice, however, could not be regarded with too much cau-So in Clark, in re, 2 Phillips, 282, the practice is disapproved, and it is said that it should be kept within narrow limits. And a small sum allowed by the master for the drainage of an estate of which the lunatic was tenant for life, with remainder to his brother, was disallowed. In Frost, in re, L. R. 5 Ch. App. 699, weekly allowances were ordered out of the surplus income of a wealthy lunatic to needy collateral relatives who were supposed to be her next of kin, though their title as such had not been established, and for whom the lunatic, while sane, had expressed an intention to make some provision. The court held that the allowances were to be treated as advancements.

committee of the estate should have been appointed before an allowance will be made for the maintenance of the lunatic's wife or children. In New York it is held to be a matter of course to make allowances in favor of the children or other descendants of the lunatic, who will inherit his estate in case of his death, and where there is but little or no hope of his recovery. But if allowances are made to adult children, competent to support themselves, these will be required to stipulate that amounts advanced to them shall be brought into the hotchpot, upon the distribution at the lunatic's death.2 In making such allowances the court will regard as far as possible the interests of the succession. Thus a payment out of accumulated rents to a lunatic's son, tenant in tail in remainder, to furnish the mansion-house belonging to the estate, in which he lived, was refused; but a sum was allowed for its repairs, it being found to be beneficial to the estate that the son should continue to inhabit it.3 Although the estate of a lunatic is to be applied under the direction of the court to the support of himself and his family, and that the fact that the estate may be exhausted is no reason for acting otherwise; 4 yet allowances for the support of the lunatic's family will not, ordinarily, be made from the principal of an estate so as to endanger an interest chargeable upon it. Thus an allowance out of an estate belonging to a lunatic to assist in educating children entitled to the estate in remainder after the lunatic, and whose mother, the petitioner, was entitled to a jointure, chargeable on the estate, was refused, the Lord Chancellor saying that this would be like taking one man's money and giving it to another. Substantially the same rules are applied in the courts of chancery in the United States in cases where it appears that the income of the lunatic's estate is more than will suffice for his own support, and that the lunatic himself, if of sane mind, would

¹ B—, in re, 1 Ir. Eq. 181.

^{*} Willoughby, in re, 11 Paige, 257.

^{*} Tottenham, ex parte, 11 Ir. Eq. 41.

⁴ Brown's Estate, 1 W. N. C. (Penn.) 134; and see Robinson, in re,

L. J. J. 1872; Stonard, ex parte, 18 Ves. 285; St. 16 & 17 Vict. c. 70, § 116.

⁵ Lanesborough, in re, 7 Ir. Eq. 606.

have provided for the persons to whom the allowance is made.¹

- § 104. Since the court in all cases acts for the lunatic, as to his estate, as it supposes he would act in like circumstances if sane,2 the practice of making allowances from the surplus income to collateral relations has in some cases been extended further for the benefit of strangers in blood to the lunatic. Thus an annuity was allowed out of the income of the lunatic's estate as a retiring pension to an old personal servant of the lunatic who was obliged to retire from his service by reason of age and infirmity, since, though no precedent was found, the committee was satisfied that the allowance was one which the lunatic, if he ever recovered, would approve.8 Upon a like principle it was held that the committee might be authorized to allow the lunatic himself to expend small sums for charity, so long as he should be competent to judge of the merit of the applicants for such charity; and also to contribute for the support of institutions of religion, where the lunatic and his family were accustomed to worship, such sums as the lunatic might desire, not exceeding the amounts which the lunatic had been in the habit, when sane, of contributing to such institutions.4 So where it appeared that the lunatic's surplus income amounted to £900 per annum, and houses belonging to him had been sold for a church site, the committee, being also the heir-at-law and sole next of kin of the lunatic, was allowed to contribute, out of the income of the latter, £250 towards the church building, and a like sum to the schools thereto attached.5
- ¹ Willoughby, in re, 11 Paige, 257; Heeney, in re, 2 Barb. Ch. 326. Thus the court has ordered a marriage settlement for the lunatic's daughter to be made out of his estate, and a sum to be paid her for her outfit. Drummond, in re, 1 Myl. & C. 624.
- ² Willoughby, in re, ubi supra; Cotton, in re, 2 Mer. 100, n.; Whitbread, ex parte, ib. 99.
 - ⁸ Carysfort, in re, Craig & Phil. 76.
- ⁴ Heeney, in re, 2 Barb. Ch. 326. But the court considered that the committee would not be allowed to expend any part of the estate for general charities to which the lunatic had not been himself in the habit of contributing regularly.
- ⁵ Strickland, in re, L. R. 6 Ch. App. 226. But see Heeney, in re, supra.

And in general it would seem that one found to be of unsound mind, and so placed in the charge of a committee or guardian, may be permitted, by an order of court made upon his petition, to make reasonable and proper gifts, if it appears that the petitioner is possessed of sufficient property to warrant the expenditure prayed for, and if he has mental capacity to enable him to understand the act of gift and its surrounding circumstances, and to form a reasonable purpose in respect of it.¹

SECTION III.

OF THE POWER TO ALIENATE THE LUNATIC'S PROPERTY.

- § 105. The committee of a lunatic appointed by the Court of Chancery has no power, independent of statute authority, to execute leases or conveyances of the lunatic's estates without leave first obtained of the court.² And in those jurisdictions where the care of the insane is committed to guardians
 - ¹ Gilbert, in re, 3 Abb. N. C. 222.
- ² Foster v. Marchant, 1 Vern. 262. In this case a mortgage having been made by the lunatic, while sane, for £50, and more money having been taken upon it by the committee, the mortgage was ordered to stand as security for the first £50 only. And an action of covenant upon a lease made by the committee of a lunatic, the committee being the plaintiff named in the action, would not lie at common law. Knipe v. Palmer, 2 Wilson, 130. In De Treville v. Ellis, Bailey Eq. (S. C.) 35, it was said that the rule which forbids the committee to lease the lunatic's real estate would operate no further than to prevent his binding the estate after the determination of the trust, and that letting the lands of the lunatic from year to year was no violation of the rule. But see Dikes, ex parte, 8 Ves. 79, and § 114. The lunatic's committee must obtain the permission of the court in lunacy before he consents to an application made to the Court of Chancery, under the Leases and Sales of Settled Estates Act. cock's Trusts, in re, L. R. 3 Ch. App. 229. It seems that the receipt by a lunatic's committee of the purchase-money of a lunatic's interest in real estate, illegally sold, will not estop a future committee from recovering possession of the property, notwithstanding improvements made since the sale. And the principle that "one who knowingly derives a benefit under an invalid deed, or a voidable transaction, cannot afterwards impeach it," is held not to apply to such a case, since the possession of the committee is solely for the lunatic's benefit, and the committee has no right to alienate the estate or to waive any irregularities in the sale. Warden v. Eichbaum, 14 Penn. St. 121. Under the practice which formerly obtained in

or other officers appointed by the courts of probate or common law, the statute, ordinarily, limits in like manner the power of the guardian to alienate his ward's estate. And although the person of a lunatic can be protected only by providing for the payment of his debts, since at common law it was within the power of any of the creditors of the lunatic to arrest him, the earlier English cases held that the Chancellor could not, upon a petition in lunacy, order a part of the lunatic's estate to be sold for the payment of his debts, even in order to prevent a bill in chancery by his creditors to apply the estate for the same purpose. But by the statute 43 Geo. III. c. 75, the Chancellor was authorized to order a sale, lease, or incumbrance of the lunatic's freeholds in certain cases.

§ 106. In New York, the care and custody of lunatics and their estates being committed by statute to the Court of Chancery, the right to alienate the property of the lunatic is considered as vested in the court in cases where it appears

England of appointing ad interim committees when the course of proceedings in lunacy was delayed, it was held that such committees, having no want of the lunatic's estate, were incapable of conveying it. Poulton, in re, 1 Mac. & G. 100; s. c. 1 H. & T. 476.

- ¹ Hall, ex parte, Jac. 161.
- ² See § 124, post.
- * Smith, ex parte, 5 Ves. 556; Dikes, ex parte, 8 Ves. 79. So it was held, where a lunatic was a tenant for life with a power to grant leases, that the Chancellor had not authority to authorize the committee to execute this power. Bradford, ex parte, West, 133.
- 4 This statute did not authorize a sale of copyhold estates of lunatics. Birch, ex parte, 3 Swans. 98. Under the authority of the Lunacy Regulation Act, 16 & 17 Vict. c. 70, § 124, the court may order an exchange of land of the lunatic, without the minerals under it. Dicconson, in re, L. R. 15 Ch. D. 316. Under the statute 23 & 24 Vict. c. 124, § 38, the court may authorize the sale of a leasehold or other interest in lands vested in trustees without power of sale for the benefit of a lunatic cestui que trust. Such an order is to be made in chancery and not in lunacy. Cheshire, in re, L. R. 7 Ch. App. 50. But where the absolute legal estate is vested in such trustees, it seems that the concurrence of the court sitting in lunacy or of the lunatic's committee is not necessary to effect a valid alienation. Skerrett, in re, 2 Drury & Warr. 585. In Lawrie v. Lees, L. R. 14 Ch. D. 249, the committee of a lunatic partner was empowered, with the sanction of the Masters in Lunacy, to concur for the lunatic in deeds of the firm of which the lunatic was a member.

that alienation is necessary to provide for the payment of the lunatic's debts, or the maintenance of himself and his family, or the education of his children. But a sale of the lunatic's real estate will not be ordered if it appears that there is personal estate sufficient for the purposes named. The principles of these rules appear to be generally embodied in the statute law, or adopted by construction of their equitable powers in the American courts. Thus in Illinois it is held that, in the absence of statute authority, the Court of Chancery, under its general equitable powers, has jurisdiction to order a sale of the lunatic's lands to provide for his support and maintenance, or to repay his conservator sums of money expended by the latter in the support of the lunatic, the conservator having no remedy at law in the premises. It is to be observed that

- 1 Pettit, in re, 2 Paige, 596; Hoag, in re, 7 Paige, 312. In the latter case the party was an habitual drunkard, so found by inquisition, and it was held that, if necessary for his reformation, the court might direct him to be confined in a lunatic asylum, and might order his estate to be sold in order to pay the expenses of his support there. See Heller, in re, 3 Paige, 596. It is provided by statute in Pennsylvania that if the personal estate of the lunatic is insufficient to pay his debts, the court may make an order for the sale or mortgage of the real estate. Act June 13, 1836, Purdon's Dig. 979. See Eckstein's Estate, 1 Clark, 224; s. c. 1 Pars. 59. So by the New York statute of 1874, c. 446, tit. 2, it is provided that, upon the application of the lunatic's committee, the court may, in proper cases, order a mortgage to be executed of the lunatic's lands. For a discussion of the proper forms and methods of proceeding upon such applications, see Agricultural Ins. Co. v. Barnard, 26 Hun, 302.
- 2 Dodge v. Cole, 97 Ill. 338. See Howard v. Thompson, 8 Ired. 367; Boyd v. Pritchett, 6 Dana, 231. A wife relinquishes her dower in her insane husband's realty by joining in a deed thereof, executed by his guardian under order of court. Rannells v. Gerner, 9 Mo. App. Rep. 506. It is apprehended that the courts may authorize any conveyance of the lunatic's property which appears to be for his advantage, although not absolutely necessary for the maintenance of himself or his family or the satisfaction of the claims of his creditors. Where, in a suit for the partition of lands in which the lunatic was entitled to an undivided share, a partition had been made and the lunatic declared a trustee within the Trustee Act, 1850, it was held, on a petition by the lunatic to have the partition carried into effect, that the Lords Justices could, under the Trustee Act, and the Lunacy Regulation Act, 1850, direct the committee to convey according to the partition. Bloomar, in re, 2 De G. & J. 88. Although the power to order a conveyance in this case was made to rest upon stat-

in the United States, generally, the committee or guardian of an insane person appointed in one state will not be permitted to alienate the property of the lunatic situated in another, his power over such property being confined to the state in which he is appointed. A similar rule obtained in England until modified by the statute 3 & 4 Wm. IV. c. 65.¹ The question of the propriety of ordering a conveyance of the lunatic's property must be raised upon proceedings had for the purpose and not collaterally, as in an action of ejectment brought by one claiming under a conservator's deed.²

§ 107. Since in all cases the first care of the court is the suitable maintenance of the lunatic,⁸ the court will not, in order to satisfy the claims of creditors of an insane debtor, make an order of sale of the debtor's property, when the effect of the sale would be to reduce the lunatic to a condition of absolute want,⁴ or to deprive him of a fitting and suitable maintenance.⁵ And, ordinarily, before the court

ute interpretation, it would seem properly to appertain to any court having jurisdiction over the persons and estates of insane persons. Brand, in re, 1 Myl. & K. 150; Snowden v. Dunlavey, 11 Penn. St. 522; Rogers v. McLean, 34 N. Y. 536. In the latter case it was held that the fact that one of the parties interested in the partition of an estate was an infant or lunatic would not deprive the other parties in such interest of their right to a petition, and sale of the premises so held in common by them, but that before sale the infant or lunatic should be brought before the court and have his rights passed upon and protected.

- ¹ See § 39, ante, notes, and cases cited.
- ² Gardner v. Maroney, 95 Ill. 552. In this case it was held that the statutes of 1845, authorizing the appointment of conservators for lunatics, and of 1853, as to sale of real estate of lunatics, applied to insane married women, although, when these statutes were passed, the common law as to the rights of married women in respect of the possession of real estate obtained in Illinois.
- * Annandale, ex parte, Ambl. 80. The welfare of the lunatic is paramount to the interests of the succession. Oxenden v. Compton, 2 Ves. 69; s. c. 4 Bro. Ch. 231. But the interests of creditors are not so paramount. See § 109, post.
 - 4 Dikes, ex parte, 8 Ves. 79.
- ⁵ Hastings, ex parte, 14 Ves. 182. "Although the general rule of the court is that no course will be taken that will prejudicially affect the interests or the comfort of the lunatic, even for the benefit of creditors, still the court will not refuse to assist creditors where that can be done

will direct any of the property of a lunatic to be applied to the payment of his debts, it will set apart a sufficient fund for maintenance of himself, his wife, and his infant children; and nothing that has been advanced for the prior maintenance of the lunatic will be allowed to be charged against the fund so set apart.¹

- § 108. A petition or other proceeding by the committee or guardian for the sale or incumbrance of a lunatic's property is regarded as instituted for his benefit, it being for the purpose of raising sums for his maintenance or that of his family, or for the payment of debts. It is held, therefore, that the insane person himself is not entitled to notice of the pendency of the proceedings.² And it is held, where a proper case is made out for a license to sell the estate of an insane person, that the power of the court is thereby set in motion, so that jurisdiction of the matter attaches; and the fact that the court has acted erroneously as to the giving of notice to the lunatic, as directed by statute, cannot affect the rights of a purchaser, in good faith, under a sale decreed as a result of the proceedings.⁸
- § 109. In the exercise of its jurisdiction to alienate or incumber the estates of insane persons, for the benefit of such persons, such alienation or incumbrance must of course be made subject to all existing liens and incumbrances; without prejudice to the lunatic; and where the court by its orders has induced creditors to prove their debts in this court, thus preventing them from proceeding at law, quære, whether the court is not bound to afford them relief. even to the prejudice of the lunatic's estate." Shaw, in re, 14 Grant's Ch. (Can.) 524. In Vaughan, ex parte, Turn. & R. 434, Lord Eldon, in order to preserve the lunatic's interests, relieved the tenant of his estate from an ejectment brought after a forfeiture arising from a breach of covenant to repair.
- ¹ Latham, in re, 4 Ired. Eq. 231; Adams v. Thomas, 81 N. C. 296; s. c. 83 N. C. 521.
- ² Dodge v. Cole, 97 Ill. 338; Agricultural Ins. Co. v. Barnard, 26 Hun, 302.
 - Mohr v. Manierre, 7 Bissell, 419.
- ⁴ Person v. Merrick, 5 Wis. 231. And a bond executed by the guardian, and conditioned to remove such liens or incumbrances, will not bind the estate. So the guardian has no authority to bind the estate by covenants in the deed, and such covenants, if valid at all, will bind the guardian personally and not the estate. Ibid.

and, further, it was said to be "a rule never departed from, not to vary or change the property of the lunatic, so as to effect any alteration in the succession to it."1 Thus the court would not permit to be sold property which the lunatic had devised while of sound mind, although the master had reported that the sale would be beneficial to the estate;2 and it is held that the clause of the Lunacy Regulation Act,8 which authorizes the court to sell for building purposes lands of which a lunatic is seized in fee-simple, should not be construed to apply to estates of which the lunatic is tenant for life only. And where a committee were permitted to execute a disentailing deed for an insane tenant in tail, and a mortgage had to be made to release a charge on the estate, it was held that the interest of the remainder-man ought not to be barred further than was necessary, and that the mortgage should be made for a term of years and without a power of sale.⁵ The same principle is embodied in the English statutes providing, where moneys are raised by sale or mort-

- ¹ Per Hardwicke, C., in Annandale, ex parte, Ambl. 80.
- ² Haycock, ex parte, 5 Russ. Ch. 154.
- * 16 & 17 Vict. c. 70, § 125.
- ⁴ Corbett, in re, L. R. 1 Ch. App. 516. It is said that there is no precedent for the sale of an easement out of an insane person's estate, for his support. Watkins v. Peck, 13 N. H. 377.
- ⁵ Pares, in re, L. R. 2 Ch. D. 61. It was held that the statute 1 Wm. IV. c. 65, § 28, conferred no power to sell the right to the next presentation to a rectory of an advowson of which a lunatic was tenant in tail in possession, except for one of the purposes specified in the section. Vavasour, in re, 3 Mac. & G. 274. See Tharp, in re, L. R. 3 Ch. D. 59. Under the same statute and St. 3 & 4 Wm. IV. c. 74, it was held that the court had not jurisdiction to authorize the committee of the estate of a lunatic tenant in tail in possession to grant leases of the estate for a term of twenty-one years so as to bind the remainder-men. Starkie, in re, 3 Myl. & K. 247. Although the court in the exercise of its lunacy jurisdiction has power under the statute, 16 & 17 Vict. § 124, to bar the estate tail of a lunatic tenant in tail, it is the duty of the court so to exercise the power as not to affect injuriously the rights of the persons entitled, in remainder, to the estate. Pares, in re, L. R. 12 Ch. D. 333. For a discussion of the Chancellor's power, as protector of lunatics under St. 3 & 4 Wm. IV. c. 74, to deal with the estates of lunatic tenants in tail, see Grant v. Yea, 3 Myl. & K. 245; Blewitt, in re, id. 250, 6 De G. M. & G. 187; Newman, in re, 2 Myl. & C. 112; Wood, in re, 3 Myl. & C. 266.

gage of a lunatic's estate, that the heirs or next of kin of the lunatic shall have a like interest in the surplus moneys raised as they would have taken in the estate had it not been so dealt with. And so where an order was made in a partition suit 2 that the share of real estate belonging to a lunation should be sold and the proceeds paid into court to the credit of the lunacy, but the proceeds were not carried to the real-estate account, and upon the lunatic's death his administrator claimed the money as a part of the personal estate, it was held that the money retained the character of real estate, and therefore should be paid over to the heir-at-law.8 On the other hand, where one, being granted the custody of a lunatic, purchased lands with the rents and profits of the estate, the court held that, as between the heir and administrator of the lunatic, the administrator should be entitled to the lands.4 And where real estate incumbered

- 1 1 Wm. IV. c. 65. And in such a case, where a lunatic's heir had died, also a lunatic, and without having elected to take such surplus moneys as personalty, it was held that these were impressed with the character of the realty. Wharton, in re, 5 De G. Mac. & G. 33. In a case occurring before the passage of the statutes above referred to, part of the lunatic's estate having been ordered to be applied in payment of a mortgage on his real estate, the Lord Chancellor said there was no doubt it would be considered personalty on the lunatic's death. Hinde, ex parte, Ambl. 706, n. The next of kin of a lunatic has not, as such, however hopeless the condition of the lunatic, any interest in his property. Dursley v. Berkley, 6 Ves. 251. Thus he cannot sustain a bill to perpetuate testimony in regard to such property. Ibid. Nor will the court make an order in the nature of a stop order on the estate of a lunatic in favor of the assignee of the next of kin. Wilkinson, in re, L. R. 10 Ch. App. 78, overruling Pigott, in re, 3 Mac. & G. 267, and Moore, in re, 1 Mac. & G. 100.
- * See Partition Act, 31 & 32 Vict. c. 40, § 8; Settled Estates Act, 19 & 20 Vict. c. 120, § 23.
 - * Barker, in re, L. R. 17 Ch. D. 241.
- Awdley v. Audley, 2 Vern. 192; Heir and Administrator, Freeman, 114. But timber felled upon the lunatic's lands by order of the court was held to be of the nature of personal property, and to be taken by the administrator upon the lunatic's decease. Bromfield, ex parte, 1 Ves. 453; s. c. 3 Bro. C. C. 310; Compton v. Oxenden, 2 Ves. 261; s. c. 4 Bro. C. C. 397; Oxenden v. Compton, 4 Bro. C. C. 231; Phillips, ex parte, 19 Ves. 118; Chumley, ex parte, 1 Ves. Jr. 156; and see Salisbury, in re, 3 Johns. Ch. 347.

by mortgage descended to a lunatic by inheritance, and the mortgagee, by an order in lunacy, was paid off out of the lunatic's personal estate, and the lunatic afterwards died intestate, it was held that the amount of the mortgage ought to be raised out of the real estate and paid over to the administrator of the lunatic as personalty. It is a general rule that the committee or guardian may not expend more than the income of the lunatic's property, or lay out the principal of the personalty for the benefit of the real estate, without the leave of the court.

§ 110. But the rule that the succession to the property shall not be interfered with yields in cases of necessity to the paramount rule which makes the lunatic's welfare the first consideration in the administration of his property. In other words, the interest of the lunatic is to be more regarded than the contingent interest of those who may be entitled to the succession. Thus the court, if it be for the interest of the lunatic, may direct the timber on his land to be sold, or his real estate to be converted into personal, or his personal into real, estate.8 So the ordinary repairs upon the lunatic's real estate will be directed to be borne by the personal estate, although any extraordinary outlay of the personal estate for the benefit of the land will, ordinarily, retain its character as personalty.4 And if it appear to be clearly for the benefit of the lunatic and his immediate family, money belonging to his personal estate may be laid out in real securities, instead of being invested in bank annuities or other personal property.⁵ In New York it is held that the court may, in its discretion, authorize the committee to apply the lunatic's personal property for the improvement

¹ Leeming, in re, 3 De G. F. & J. 43.

² Kennedy v. Johnston, 65 Penn. St. 451; and see § 101, ante.

⁸ Salisbury, in re, 3 Johns. Ch. 347; Colvin, in re, 4 Md. Ch. 278.

⁴ Badcock, in re, 4 Myl. & C. 441.

Johnson, ex parte, 1 Molloy, 128. In Pickersgill v. Read, 5 Hun, 170, it was held that the committee of the estate of a lunatic who had invested a portion of the estate in a mortgage might release a part of the premises covered thereby without first obtaining the leave of the court.

of unproductive real estate, as by the erection of buildings thereon.1

- § 111. So under the later English statutes the rule obtains that where sums are expended under order of court for the permanent benefit of the lunatic's estate in possession, these may properly be charged upon the estate, as being equally for the benefit of the lunatic and the heirs or remainder-man. Thus where repairs and permanent improvements to a large amount upon an estate of which a lunatic was tenant-in-tail in possession were found expedient, and there was in court a sufficient fund in personalty to which the lunatic was absolutely entitled, and his income was much more than sufficient for his requirements, the amount required for repairs and improvements was ordered to be raised by mortgage or charge of the settled estate; and Baggallay, L. J., said: "I am clearly of opinion that, under sec. 118" (Lun. Reg. Act, 16 & 17 Vict. c. 70), "there is jurisdiction to order such of these expenses as relate to the settled estate to be raised by mortgage or charge of that estate." 2 So the lunatic's life estate in lands may, in proper cases, be converted into personalty. Thus where lands which were subject to a rent. charge in favor of a lunatic during his life were lawfully taken by a corporation, the court authorized the committee of the lunatic to release the lands from the rent charge, upon the corporation purchasing, in the name of the lunatic, a government annuity of the same yearly amount for his life.8
- § 112. The same principle is applied to cases in which it appears to be for the advantage of the lunatic or his heir-at-law that his real estate should be relieved from charges upon it. Thus, in a leading case upon the subject it appeared that a person who had been found a lunatic was seized in fee of

¹ Livingston, in re, 9 Paige, 440.

² Gist, in re, L. R. 5 Ch. D. 881.

Brewer, in re, L. R. 1 Ch. D. 409. Where, by authority of a special statute. a lunatic's committee was authorized to sell his goods and land, and to invest the proceeds in bank stock or real securities, and it was provided that whatever remained of such investments at the lunatic's death should be distributed according to law among his legal representatives, it was held that such residue was personal estate, and, as such, to be distributed among the next of kin. Clarke v. Ruttan, 11 Grant's Ch. 416.

an estate subject to a charge. Pending the lunacy proceedings the owner of the charge applied for payment of it, and the court referred the matter to the master to inquire and report whether it would be for the benefit of the lunatic to pay off the charge, and, if so, out of what fund it should be paid. The master reported that it would be beneficial to pay the charge out of a fund in court, the produce of the savings of the estate subject to it. The court ordered that the charge should be paid off out of that fund, and should be assigned to a trustee, either to attend the inheritance or for the lunatic, his executors and administrators, as the court should afterwards decide. The charge was paid off and assigned to a trustee in conformity with the order of the The lunatic subsequently died intestate, without issue, and without having recovered his faculties. It was held, upon a bill filed by his personal representative, that the heir-at-law of the lunatic was entitled to hold the estate freed from the charge, and that the next of kin were not entitled to the benefit of the charge. So where a charge affecting the real estate of a lunatic, of which estate the lunatic was the quasi owner in fee under a lease of lives renewable forever, was paid off by the committee, without any order for that purpose, out of the rents and profits of the real estate, it was held that such payment operated to relieve the estate for the benefit of the heir-at-law of the lunatic, and that there was no lien upon the estate in favor of the next of kin, they having no equity to have the charge kept alive for their benefit.2 Where real estate of the lunatic

- 1 Leitrim v. Enery, 6 Ir. Rep. Eq. 357; s. c. Drury, 330. In this case the Lord Chancellor said that the proper time to decide whether the payment of a charge affecting the real estate of a lunatic would have the effect of exonerating the inheritance is when such payment is made, and that the decision of the question ought not to be deferred until after the lunatic's death.
- ² Newcombe v. Newcombe, 3 Ir. Rep. Eq. 414; s. c. Drury, 358. And see Grimstone's Case, Ambl. 706. It is said in Newcombe v. Newcombe that the authority of Grimstone's Case is not shaken by the observations of the court in Weld v. Tew, Beatty, 266. In the latter case Grimstone's Case was doubted, and it was held that the court would not order the lunatic's personalty to be converted into real estate unless for the purpose of effecting repairs.

has, by order of court or by the lunatic's guardian, been converted into personal property during the lifetime of the lunatic, it has been held that the resulting funds remaining at the lunatic's death in the hands of the court or guardian will be payable to the personal representative of the lunatic.¹

§ 113. The court having in the proper exercise of its jurisdiction authorized the committee to sell the lunatic's estate to satisfy his debts, it was held that the lunatic's restoration to sanity, as found by a second inquest, did not divest the court of jurisdiction of the proceedings instituted by the committee appointed under the first inquest to sell the estate to pay debts, since it was no objection to the exercise of the jurisdiction that the original reason for assuming it no longer existed. The validity of the appointment of a committee, guardian, or conservator of an insane person cannot be questioned collaterally in a suit brought to set aside a sale of lands duly made by him under a decree of the court. And the rule is applied in cases where the sale is made by a conservator appointed under the laws of a state other than that

¹ Smith v. Baywright, 7 Stewart, Eq. 424. In this case a non-resident monomaniac had been made a party to proceedings in partition. She had never been declared a lunatic, and a guardian ad litem had been appointed to protect her interests in the suit. The premises were sold and her share of the proceeds paid into court in 1871. From 1871 to 1878 she was confined in an insane asylum in Pennsylvania, but from 1878 till her death in 1880 she lived in her own home in that state. She frequently declared her intention of obtaining the money paid into court as her share, but died without having done so. It was held that the fund, including accrued interest, was personalty, and payable to her administrator. See reporter's note to this case, and cases cited, and also Wharton, in re, 5 De G. M. & G. 33, in which case, under the statute 11 Geo. IV. & 1 Wm. IV., authorizing moneys to be raised by sales of mortgages of lunatics' estates, and providing that the lunatics' heirs, next of kin, &c., should have a like interest in the surplus moneys so raised as they would have had in the estate had it not been so dealt with, and that such moneys should be of the same nature as the estate; it was held, where a lunatic's heir had died, also a lunatic, and without having elected to take such moneys as personalty, that these were impressed with the character of the realty.

² Salter v. Salter, 6 Bush, 624.

^{*} Dodge v. Cole, 97 Ill. 338.

in which the proceedings and sale are had, the laws of the latter state authorizing such sales by non-resident conservators.¹

(a.) Leases by Committee or Guardian.

§ 114. Independently of authority given by statute, the committee of a lunatic could not, in England, execute leases of the lunatic's lands without an express order of the court.2 Nor had the court power to authorize the committee to make a lease of the lunatic's estate which the latter might not, upon his restoration to reason, terminate.8 But, it now being considered generally that the court may order the alienation of the estates of insane persons in proper cases, the power so to alienate, whether expressly granted by statute or whether considered as part of the inherent jurisdiction of a court of chancery, would seem to include the power of authorizing committees or guardians of insane persons to make specific leases of the lands of the latter independent, in point of duration, of the lunatic's restoration to sanity.4 Thus one arranged by letter with an agent acting for the committee of a lunatic's estate to take a lease for years of part of the estate. No formal agreement was made, nor was the sanction of a master in lunacy applied for; but the tenant was let into possession, and made considerable repairs and improvements on the estate. After eighteen months' possession, the committee gave him six months' notice to quit. He thereupon applied to the court by petition to have the terms of the arrangement with the agent carried into effect; and the court held that it had jurisdiction so to do, and ordered accordingly.5 It is held that in the leasing or underletting of the lands of the lunatic, as of an infant, the court possesses the discretion

¹ Wing v. Dodge, 80 Ill. 564.

See § 105, ante. And it was held that a lease renewed for the benefit of the lunatic's estate should be taken in the name of the lunatic, if so taken at the time of the lunacy, but if originally in trust for the lunatic, then to the committee. Jermyn, ex parte, 3 Swanst. 131, n.

⁸ Dikes, ex parte, 8 Ves. 79. But see De Treville v. Ellis, 1 Bailey Eq. (S. C.) 35.

⁴ See Taylor, Landlord and Tenant, § 136.

⁵ Wynne, in re, L. R. 7 Ch. App. 229.

of a landlord, and should not be governed solely by the highest bidding.¹ It seems that the court will not entertain an application to lease the lands of a lunatic unless the committee join in the petition, or, at least, assent to the letting.²

(b.) Costs of Conveyancing.

§ 115. Upon a conveyance of the real estate of an insane person being made by order of the court, it is apprehended that, in the United States at least, the costs of conveyancing will ordinarily be borne by the estate of the lunatic, the conveyance being made for his benefit. In the case of a lease, however, it has been held in an English case that the costs of the preliminary inquiry should be borne by the estate, but that the costs of the lease itself should be paid by the lessee.8 And so where an application was made on the part of persons representing the tenant for a reference to a master to inquire and report as to the liability of a lunatic to renew the lease under which the premises were held, the application being granted and the right of the parties seeking the renewal established, it was held, nevertheless, that the costs of the petition and all the proceedings thereunder should be borne by the applicants.4 It was held, under the Trustee Acts, 4 Geo. II. c. 10, and 1 Wm. IV. c. 60, that upon obtaining a reconveyance to the mortgagor of an estate vested by an equitable mortgage in a lunatic trustee or mortgagee, the costs were to be borne by the lunatic's estate. But this rule will not be applied unless it appears that the lunatic is beneficially interested in the mortgage money, or unless his committee either petitions for the conveyance or declines to do so.6 And where it appears clearly upon the face of the deed that the lunatic is a trustee of the mortgaged property, the expenses

¹ Ball, in re, 1 Molloy, 141.

² Kilkenny, in re, 7 Ir. Eq. 594.

Prickett, ex parte, 3 Swanst. 130.

⁴ Doolan, in re, 3 Drury & Warren, 442.

Brydges, ex parte, Cooper, 290; Richards, ex parte, 1 Jac. & W. 264; Pearse, ex parte, Turn. & R. 325; Townsend, in re, 2 Phillips, 848; Same, in re, 1 Mac. & G. 686.

[•] Wheeler, in re, 1 De G. M. & G. 484.

of reconveyancing are to be borne by the mortgagor. In one case costs were allowed to the next of kin of the lunatic, as being parties upon the hearing of the committee's application to convey. Where an application was made for an order to restrain an action at law brought by an auctioneer against the solicitor in a lunacy proceeding, to recover compensation for selling property of the lunatic under authority of the court, the auctioneer having acted under instructions of the solicitor, and with the sanction of the master, before whom he had at first carried his claim, a reference to a master was directed for the purpose of ascertaining what should be allowed him.

¹ Lewes, in re, 1 Mac. & G. 28.

⁸ Briscoe, in re, 2 De G. J. & S. 248.

^{*} Weaver, in re, 2 Myl. & C. 441.

CHAPTER VI.

OF SUITS BY OR AGAINST INSANE PERSONS, THEIR GUARDIANS OR COMMITTEES.

§ 116. It was the doctrine of the early English law that neither idiots, madmen, nor such as were born deaf and dumb, could sue in the courts.¹ But the right of lunatics and deaf and dumb persons to sue is said to have been generally admitted before Lord Coke's time,² although the right of idiots to appear in the courts was still questioned. Thus in an early case it was pleaded that the defendant was an idiot. The replication was that she was of sound mind until such day as she became non compos mentis, whereupon the plaintiff pleaded that she was an idiot from the time of her birth; and these pleadings were considered as raising a substantial issue.³ At the present day the distinction referred to is unimportant, since, if the party be mentally incapable of performing any act, the modern law will not concern itself to inquire into the causes or the specific characteristics of his incapacity.⁴

SECTION I.

BUITS IN BEHALF OF INSANE PERSONS --- HOW CONDUCTED.

- § 117. An action at law to enforce the rights of a person who has been adjudged insane by a competent tribunal must be instituted by the guardian, committee, or other person to whom the custody of the lunatic and his property has lawfully been committed. And the fact that such an action has
- ¹ Co. Lit. 135 b; and see Staun. de Prer. Regis, 83; Bracton, lib. 5, f. 421.
 - ² Pope, Lun. 298.
- * Dennis v. Dennis, 2 Saund. 328; Dennis v. Phrasier, 2 Keb. 691 (1682); Lang v. Whidden, 2 N. H. 435.
 - 4 See ch. i. sec. vii.

been commenced by the insane person himself, or by a stranger ostensibly in his behalf, has been held ground for abating the suit.¹ But such actions must be brought in the name of the lunatic, if he be of full age; not in that of the guardian or committee.² The latter, however, may maintain an action in his own name upon his own contract relating to the property of his ward in his custody,—the contract, not the question of the title to the property, being the foundation of the suit.³ If the insane person be under age, suits in his behalf must be brought by his guardian, if he have one.⁴ It has been held that any person interfering in a suit, although in the interest of an insane party thereto, takes the risk of being saddled with the costs of the proceedings,⁵ even although he be a receiver, duly appointed, of the lunatic's estate and acts in good faith.⁶

- 1 Collard v. Crane, Brayt. 18; Holden v. Scanlin, 30 Vt. 177. But see Allen v. Ranson, 44 Mo. 263. In an action in favor of a person of unsound mind, brought by his guardian, the defendant pleaded in abatement the pendency of a prior suit between the same parties for the same cause of action. The plaintiff replied, that when the first suit was commenced the plaintiff was under guardianship, and that the guardian did not sue out the writ in that suit, and was not a party thereto, nor in any way named in it. It was held that the plea in abatement, as it did not deny the guardianship, was insufficient to abate the second suit, in that it did not allege either that the first action was commenced before the plaintiff was placed under guardianship, or, if after, that it was commenced by the procurement or assent of the guardian. Lincoln v. Thrall, 34 Vt. 110.
- ² Cocks v. Darson, Hobart, 215; Drury v. Fitch, Hutton, 16; Northumberland's Case, Popham, 141; Shaw v. Burney, 1 Ired. Eq. 148; Green v. Kornegay, 4 Jones, 66; Jelly v. Elliott, 1 Ind. 119; Reed v. Wilson, 13 Mo. 28; Cameron's Committee v. Pottinger, 3 Bibb, 11.
- * Crane v. Anderson, 3 Dana, 119. In such an action the defendant cannot set off a debt due by the lunatic to him, since, "if the plaintiffs were chargeable with that debt [of the lunatic] as his committee, they were liable in another right, and it cannot be mingled up with a claim in their own right." Beale v. Coon, 2 Watts, 183. But see contra, Nickerson v. Gilliam, 29 Mo. 456.
- ⁴ McCreight v. Aiken, Rice, 56. See Shaw v. Burney, 1 Ired. Eq. 148; Amos v. Taylor, 2 Brev. 20.
 - ⁵ Beall v. Smith, L. R. 9 Ch. 85; s. c. 43 L. J. N. s. Ch. 245.
- ⁶ Montgomery, in re, 1 Molloy, 419; Doolan, in re, 2 Conn. & Laws. 232; Kilkenny, in re, 7 Ir. Eq. 594.

§ 118. In North Carolina it has been held, in conformity with the rule stated above, that a lunatic's guardian could not bring an action of ejectment, nor any other action at law for the lunatic's benefit, in his own name; 1 and the same rule obtained in New York.² But in Pennsylvania it was held that the lunatic's committee might maintain ejectment in his own name to recover possession of the lunatic's real estate, since the statute of June 13, 1836, §§ 14, 20,8 committed the custody of the lunatic's person and estate to his committee; and, in the same state, in order to maintain an action of ejectment it was only necessary to show a right of possession in the plaintiff as against the defendant.4 In an earlier case in the same state it had been held that all actions by or on behalf of a lunatic in the care of a committee must be in the name of the lunatic and the committee, since "the latter must join to manage the [lunatic's] interests; . . . and the lunatic must be joined, because he may recover his understanding." 5 In Virginia it is held, under the statute, that where there is a committee of a lunatic, every suit respecting the person or estate of the lunatic must be in the name of the committee.6 In Illinois it is provided that the conservator of a lunatic shall "sue for and receive in his own name, as conservator,

- ¹ Brooks v. Brooks, 3 Ired. 389.
- ² Petrie v. Shoemaker, 24 Wend. 85; Lane v. Schermerhorn, 1 Hill, 97.
- * Purd. Dig. 979.
- 4 Warden v. Eichbaum, 14 Penn. St. 121.
- ⁵ Beale v. Coon, 2 Watts, 183. See also Steel v. Young, 4 Watts, 549. It is held in Pennsylvania that, since the act of Feb. 20, 1867, there is no doubt as to the power of a committee to maintain an action for partition. Klohs v. Reifsnyder, 61 Penn. St. 240.
- Bird's Committee v. Bird, 21 Gratt. 712. Until the Revisal of 1819, no action could be maintained in detinue, nor any action except for debts, by the committee of a lunatic, and these last by the committee of a lunatic "sent to the hospital." Ibid.; Ashby v. Harrison, 1 Patt. Jr. & H. 1. Now, by statute in Virginia, the jurisdiction over insane persons and their estates is concurrent in the circuit and county courts, and the committee of an insane person is entitled to the custody and control of his person (when he is resident in the state and is not confined in an asylum or jail), shall take possession of his estate, and may sue and be sued in respect thereto, and for the recovery of debts due to or from the insane person. St. 1840-41, p. 41, § 16; Code 1873, tit. 24, c. 82, § 42.

all personal property of and demands due his ward." But the courts hold that, until the appointment and qualification of the conservator, suit may properly be brought in the name of the lunatic. By statute in New Jersey the right of appearing in, prosecuting, or defending suits is confined to persons of sound mind. And the objection that a bill in equity is exhibited by a person of unsound mind may be raised by demurrer or by motion to take the bill from the files. In Alabama it is provided by statute that the guardian of an idiot or lunatic may sue at law, not only for the recovery of a debt, but in any case in which the guardian of infants might maintain suit.

§ 119. Suits in equity for the benefit of insane persons are to be instituted by the guardian or committee, who must be made parties to the suit. It appears to have been held that the joinder of the lunatic himself in such suits is never necessary; but the better rule appears to be, that where a bill is filed by the committee to set aside an act done by the lunatic, upon the ground of the incompetency of the latter to do the act, it is not necessary that the lunatic be made a party, although he may be joined. In all other cases the lunatic should be joined with the committee as a party, or the bill should be filed in the name of the lunatic by his committee. And failure, in such cases, to join the lunatic as a party is good ground for special demurrer, although the objection may be waived by failure to demur, or by setting up a mere general demurrer to the bill for want of equity. Thus a

- ¹ R. L. 1874, c. 86, § 11.
- ² Chicago & Pacific Railroad Co. v. Munger, 78 Ill. 800.
- * Mix Dig. 654, § 1.
- ⁴ Norcom v. Rogers, 1 C. E. Green, 484.
- ⁵ Act 1806, § 52; Aik. Dig. 221; Dearman v. Dearman, 5 Ala. 202.
- ⁶ 1 Dan. Ch. Pr. 8, 108; Attorney General v. Tiler, 1 Dickens, 378; Norcom v. Rogers, 1 C. E. Green, 484; Dorsheimer v. Roorback, 3 C. E. Green, 438; Rebecca Owing's Case, 1 Bland's Ch. 290; Amos v. Taylor, 2 Brev. 20.
 - ⁷ See Shaw v. Burney, 1 Ired. Eq. 148, and authorities cited.
- * Gorham v. Gorham, 3 Barb. Ch. 24; and see Ortley v. Messere, 7 Johns. Ch. 139; M'Creight v. Aiken, Rice, 56; Attorney General v. Parkhurst, 1 Ch. Cas. 112; Attorney-General v. Woolwich, id. 153; Fuller v. Lance, id. 19; Clark v. Clark, 2 Vern. 412; Addison v. Dawson,

bill brought by the committee of a lunatic in their own names as committee, without joining the lunatic, and praying for a partition of lands of which the latter was a part owner, and for an account, was held to be defective in form. the objection being taken by special demurrer it was held that no part of the bill could be sustained. Applying the same principle, it is held that the committee of the estate and person of a lunatic cannot, in his own name, bring an action to recover the possession of real property alleged to have belonged to the lunatic before the appointment of the committee, such a committee not being the trustee of an express trust within the contemplation of the statute; 2 for a lunatic, by the appointment of a committee, is said to lose none of his rights in property or rights of action already vested.³ On the other hand, since an action may be maintained by the committee alone for the purpose of setting aside an act or deed of the lunatic while such,4 an action to rescind the sale of a farm made to an insane grantee, and to cancel the satisfaction of a mortgage given by him, may be properly brought in the name of the committee alone.⁵ On an application of the principles stated, it is held that the lunatic should be joined with his committee as co-petitioner in any application to the court affecting his property.6

§ 120. When a person is in fact insane, but has not been so adjudged by a competent tribunal, or placed in charge of a committee or guardian, the courts, whether of law or equity, have jurisdiction to entertain suits brought by one as the next friend of the insane person. And when the

id. 678; Ridler v. Ridler, 1 Eq. Cas. Abr. 279; Southerland v. Goff, 5 Port. (Ala.) 508; 1 Dan. Ch. Pr. 9.

- ¹ Gorham v. Gorham, 8 Barb. Ch. 24.
- ² Burnet v. Bookstaver, 10 Hun, 481; Code Civil Proc. (N.Y.), § 118.
- McKillip v. McKillip, 8 Barb. 552.
- ⁴ Person v. Warren, 14 Barb. 488; Code Civil Proc. § 111.
- Fields v. Fowler, 2 Hun, 400.
- ⁶ Bourke, in re, 2 De G. J. & S. 426.
- Newcomb v. Newcomb, 13 Bush, 544; Jetton v. Smead, 29 Ark. 872; Light v. Light, 25 Beav. 248; Morrison, in re, cited in 2 Ves. Sen. 87; Scott v. Bentley, 1 Kay & J. 281. In Nelson v. Duncombe, 9 Beav. 211, it was broadly stated that a bill in equity might be filed in the name of one

interests of a guardian or committee appointed by proper authority after an adjudication of insanity clash with those of the lunatic in respect of the subject-matter of the suit to be brought, such suit may be instituted in the name of the lunatic by his next friend, or by the law-officer representing the state for the time being. And when a person actually insane, though not so found, sues with a co-plaintiff, the latter may be treated as his committee, upon giving security to account for any money which shall, as a result of the suit, be paid to him for the use of the lunatic. The nearest rela-

alleged to be of unsound mind, though not so found, by any person professing to be his next friend. But the expression is not to be construed as establishing conclusively the right of any person to maintain such a suit. See Dorsheimer v. Roorback, 3 C. E. Green, 438, where a bill filed in the name of an idiot by a volunteer, styling himself her next friend, not appointed her guardian upon inquisition found, nor authorized by the court to file the bill, was dismissed on the motion of the defendant.

- ¹ Attorney General v. Panther, Dickens, 748. In this case the committee of a lunatic and executors of her deceased husband had the possession of property given her for her separate use, claiming under a deed executed by her during her lunacy, and upon a bill brought by the Attorney General at the relation of the lunatic and for her benefit, to rescind the deed and obtain possession of the property, "it was at first doubted, but after a pause was held by the court that a bill might be brought by the Attorney General in behalf of a lunatic against those possessing the lunatic's property and those attempting to deprive him of it, for an account of, and to secure such property for, the lunatic; and an issue was directed to try whether she was a lunatic at the time she executed the appointment, under which the executors of the husband claimed." See also Norcom v. Rogers, 1 C. E. Green, 484; Bird's Committee v. Bird, 21 Gratt. 712; 1 Dan. Ch. Pr. 8, 108; Story Eq. Pl. § 64. It is held that in such a case the committee will be before the court as a co-defendant. Fuller v. Lance, 1 Ca. in Ch. 19; Bishop of London v. Nichols, Bunb. 141.
- 2 Rebecca Owing's Case, I Bland's Ch. 290. Where a consent to dismiss a bill without costs was signed by one of the plaintiffs, on behalf of himself and another plaintiff who was of imbecile mind, this being done not by or with the privity of counsel, it was held, upon a motion to make the consent a rule of court, that the signature on behalf of the imbecile plaintiff was a nullity, as he was not competent to authorize the act. Brangan v. Gorges, 7 Ir. Eq. 221. In a case in which certain agreements were entered into by the counsel for a supposed lunatic confined in an asylum, upon proceedings under an inquisition, it was held competent for the supposed lunatic to prove, in order to invalidate the

tive of the lunatic is prima facie the proper person to act as his next friend, and, as standing in the natural relation of next friend to her insane husband, it is held that the wife of a lunatic having no committee has implied authority to sue in his name for debts due him; and, in such an action brought, the defendant having paid money into court, the court ordered it paid out to the wife. If, during proceedings in equity conducted by the next friend of a plaintiff not found a lunatic by inquisition, a commission in lunacy issues against the plaintiff, the court may stay proceedings to await the result of the inquisition; and, in case of a finding of lunacy, the committee of the plaintiff will ordinarily be substituted for the next friend in the further proceedings.

§ 121. The principles already stated are applied in suits brought for divorce, or for a decree of nullity of marriage on the ground of the insanity of the complainant or libellant, it being held that such suits may be instituted by the committee of the lunatic's estate,⁵ or by his guardian.⁶ It would seem that such suits should be brought in the name of the

agreement, that the consent of her counsel "was obtained by constraint and without her free will," and that, the jury having found that the agreements were so obtained, she was entitled to a verdict on the issue, and that the legality of the restraint and the consent of counsel furnished no conclusive proof that the agreement was not void for duress. Cumming v. Ince, 11 Ad. & Ell. N. s. Q. B. 112. See Litton v. Power, 7 Ir. Ch. 64.

- ¹ Pope, Lun. 302 et cit.
- 2 Rock v. Slade, 7 Dowl. Pr. Cas. 22.
- * Gleddon v. Treble, 9 C. B. N. s. 366. Under the rule of the common law requiring the joinder of husband and wife in suits brought in behalf of the latter, the husband being insane and confined in another state, it was held that the wife might sue in her own name for a wrong personal to herself. Gustin v. Carpenter, 51 Vt. 585.
 - 4 Hartley v. Gilbert, 13 Sim. 596.
- Baker v. Baker, L. R. 6 P. D. 12; Portsmouth v. Portsmouth, 3 Add. 63; Woodgate v. Taylor, 2 Sw. & Tr. 512; Parnell v. Parnell, 2 Phill. 158; s. c. 2 Hagg. Cons. 169, citing Fust v. Bowerman. See Turing, ex parte, 1 Ves. & Bea. 140. It was held that a lunatic's committee may institute proceedings in the ecclesiastical courts against the lunatic's wife for her adultery, without leave previously obtained of the Lord Chancellor. Parnell v. Parnell, 2 Phill. 158. But see Shelf. Lun. 578, 579 et cit.; Pope, Lun. 250 et cit.
 - Waymire v. Jetmore, 22 Ohio St. 271.

committee or guardian, or at least that these should be made parties to the proceedings; 1 although it has been held that suits for nullity of marriage on the ground of insanity may be brought either in the name of the lunatic by her guardian, or in the name of the guardian, and that the former course is sometimes preferable.² So, in cases where the libellant is in fact insane, although his insanity has not been determined judicially, the court may permit the libel to be prosecuted by his next friend, or may, upon proof of his insanity, appoint a guardian ad litem to represent him.8 It was held that the fact that both parties were insane when a petition for an absolute divorce was filed (under a statute providing that such a divorce might be granted upon the petition of a party who had previously obtained a divorce nisi), was not a conclusive reason for dismissing the petition; and, on the other hand, that the fact that the divorce nisi was obtained while the parties were sane did not make it conclusive that an absolute divorce should be decreed, and that a statement of facts agreed on by the guardians of the parties did not relieve the court from its duty to dispose of the case as public policy and the parties' interests might require.4

- ¹ See § 118, ante.
- ² Crump v. Morgan, 3 Ired. Eq. 91.
- ⁸ Baker v. Baker, L. R. 5 P. D. 142; s. c. on appeal, L. R. 6 P. D. 12; Turing, ex parte, 1 Ves. & Bea. 140; Waymire v. Jetmore, 22 Ohio St. 271; Denny v. Denny, 8 Allen, 311; Garnett v. Garnett, 114 Mass. 379. In Worthy v. Worthy, 36 Ga. 45, it was held that a suit for divorce, brought in the name of a lunatic wife by her next friend, could not be maintained; that the right to institute such a suit was strictly personal; that it was to be brought, if at all, at the volition of the wife only, and non constat that the will of the next friend may be hers. It was said that the courts regard only the intelligent will of the lunatic. Bradford v. Abend, 89 Ill. 78, where a bill for divorce had been filed in the name of an insane wife, she being in close confinement in another state, it was held that she could give no consent to the proceedings, and that everything done in her name, and the decree of divorce, was invalid, and might be set aside on a bill filed by her conservator. The court said that whether there was fraud in fact or not the law would presume it from the unequal position of the parties, and the fraud would vitiate the decree. But see remarks of Dr. Radcliff in Carpenter v. Carpenter, Milward, 159.
 - 4 Garnett v. Garnett, ubi supra.

SECTION II.

SUITS AGAINST INSANE DEFENDANTS.

(a.) In general.

- § 122. It was a well-established rule at common law that an insane person might be sued for his debts, and the fact that a writ de lunatico inquirendo had issued did not change the rule, nor would the appointment of a committee for the insane defendant arrest the progress of the action.1 And no action at law or in equity could be maintained against the committee for the lunatic's debt, since the committee was considered the mere curator of the lunatic's property, and could make no contracts to bind the latter.2 When an action at law for a debt was commenced against an insane person so found by inquisition, the Lord Chancellor, on petition of the committee, would order a reference to a master to ascertain whether it was proper to defend; but a suit in equity could not be maintained to enforce such a debt, and the court would send a party promoting such a suit to seek relief in a common-law tribunal.4 In the United States the
- ¹ Broom on Parties, 182; Dicey on Parties, 2; Anonymous, 13 Ves. 590; Thorn v. Coward, 2 Sid. 124; Tyrell v. Jenner, 3 Moo. & Payne, 648; Coombs v. Janvier, 2 Vroom, 241. In Mississippi, if an insane person have a guardian, the latter must be joined as a party defendant in suits against his ward. Miss. Code 1871, § 705; and see Potts v. Hines, 57 Miss. 735.
- The committee "was appointed by the Chancellor, not ex virtute officii, but by delegation of power from the crown. The King, by statute de prerogativa regis, 17 Edw. II., was bound to provide for the safe keeping of the property and the maintenance of the lunatic. He was compelled to do this by his agents, and delegated the appointment of these to the holder of the great seal. These agents were merely the receivers or bailiffs of the crown, and were accountable to the Chancellor as keeper of the King's conscience. They had no title in the property of the lunatic, could not contract for him, or sue or be sued as his representative." Van Horn v. Hann, 10 Vroom, 207. See Dennis v. Dennis, 2 Saund. 328; Rodgers v. Ellison, Meigs, 88.
 - * Shelf. Lun. 408.
- ⁴ McDougal, ex parte, 12 Ves. 384. But when the debt against the lunatic was admitted to be due, the Chancellor might, after the St. 43

same rules are applied in those jurisdictions where the courts consider that the authority over lunatics is derived from, and equivalent to, that of the Court of Chancery in England, or that the committee, guardian, or curator takes no legal estate in the lunatic's property.¹ But in those states where the courts of chancery are considered as having complete jurisdiction to dispose of the property of insane persons, the court may interfere to restrain suits at law brought against an insane defendant, and, upon equitable proceedings, duly conducted for that purpose, to satisfy the just claims of the lunatic's debtors.²

§ 123. And the rule of the common law making lunatics, although so found by inquisition or otherwise, equally liable to suit with sane persons, has been modified or changed in many jurisdictions, even where chancery does not assume the control and management of the lunatic and his affairs. Thus in Illinois all claims against an insane person are to be prosecuted by suit against the conservator, as being the lunatic's representative; and upon judgment obtained in such a suit the lunatic's estate may be taken upon execution. But it seems that a decree of court appointing a guardian for an insane person, which decree is afterwards reversed on appeal, will not be a sufficient objection to the maintenance of a suit against such a person, although the suit be commenced after the appeal but before the reversal.

Geo. III. c. 94, entertain a petition to establish it and provide for its payment out of the proceeds of the lunatic's estate not needed for his maintenance. See § 105 et seq.

- ¹ Van Horn v. Hann, 10 Vroom, 207; Leighton, ex parte, 14 Mass. 207; Aldrich v. Williams, 12 Vt. 413; Warden v. Eichbaum, 3 Grant's Ch. 42; Bolling v. Turner, 6 Rand. 584; Cameron's Committee v. Pottinger, 8 Bibb, 11; Allison v. Taylor, 6 Dana, 87; Walker v. Clay, 21 Ala. 797; Symmes v. Major, 21 Ind. 443.
 - ² See (e), post, and cases cited.
- * Morgan v. Hoyt, 69 Ill. 489. See Rev. Laws Ill. 1845, c. 50, § 5; Gross, 372, § 6; Rev. Sts. 1883, c. 86. See § 124, note.
 - 4 Smith v. Davis, 45 N. H. 566.

(b.) Judgments duly obtained against Insane Defendants valid.

- § 124. It follows that at common law a valid judgment may be rendered against an insane defendant, whether the fact of his insanity has been decided judicially or not, and upon execution issuing on such a judgment the goods of the defendant may be seized or his person arrested. This rule was recognized in early cases, where it was held that the court would not discharge a defendant out of custody upon his giving common bail, on the ground that he was insane at the time of his arrest, or had so become after his arrest. And where a debtor arrested on civil process was discharged under
- ¹ Shelf. Lun. 395, 407; Clarke v. Dunham, 4 Denio, 262; Robertson v. Lain, 19 Wend. 649; Henry v. Brothers, 48 Penn. St. 70; Weber v. Weitling, 3 C. E. Green, 441; Stigers v. Brent, 50 Md. 214; Johnson v. Pomeroy, 31 Ohio St. 247; Walker v. Clay, 21 Ala. 797.
- ² Tomlinson v. Devore, 1 Gill, 345; Campbell's Case, 2 Bland's Ch. 209; Rau v. Katz, 26 La. Ann. 463; Allison v. Taylor, 6 Dana, 87; German National Bank v. Engeln's Com., 14 Bush, 708. In Kentucky the statute provides that no judgment or decree shall be binding against a lunatic having a committee unless the committee be brought into court, and, further, that chancery may, on the application of the committee, order the sale of the whole or a part of the lunatic's estate to satisfy his debts. 1 Stant. Rev. Sts. c. 48, §§ 2, 4. And it is held in the same state that a judgment recovered against one afterwards found insane cannot be satisfied by execution after such finding, the defendant being civilly dead. McNees v. Thompson, 5 Bush, 686. But the levy of an execution creating an incumbrance on the lunatic's estate, it was held that the committee had a right to pay the judgment debt and look to the estate for its reimbursement, and that this right was not lost by the fact that the committee had, under the advice of counsel, procured the proceedings under the levy to be enjoined in order to litigate the debt in behalf of the estate. Salter v. Salter, 6 Bush, 624.
- * Ex parte Leighton, 14 Mass. 207; Davis v. Drew, 6 N. H. 399; Steel v. Allan, 2 Bos. & Pul. 362. In the latter case, Lord Eldon, C. J., said: "I am afraid there is no prohibition in the law of England from arresting a lunatic. I have often known the Court of Chancery to go out of its jurisdiction in order to assist a lunatic in this respect; and order a master to take an account of his debts, cousidering it to be for the benefit of the lunatic that they should be paid, as he would otherwise be subject to arrest by all his creditors."
 - 4 Nutt v. Verney, 4 T. R. 121.
 - ⁵ Kernot v. Norman, 2 T. R. 390.

a statute which provided that a prisoner confined on civil process might, on proof of his insanity, be discharged, ordered into safe custody, and sent to a lunatic asylum, it was held that the order for discharge must contain a direction that the prisoner be sent to an asylum, else it would be void, and the sheriff serving it liable for an escape. The court further intimated an opinion that, upon the recovery of a prisoner so discharged and sent to an asylum, he might be arrested again by his creditor.1 It is held to be no objection to signing judgment by virtue of a warrant of attorney that the defendant is insane at the time of such signing.2 And the insanity of the principal is no ground to exonerate his bail, in a civil suit.3 So where the principal in a bond given by a debtor arrested upon execution, under the provisions of a statute for the relief of poor debtors, became insane, and so remained until after the expiration of the time fixed in the bond within which he might apply to take the poor debtor's oath, it was held that the fact that the debtor was rendered incapable of taking the oath did not exonerate his sureties in an action brought on the bond.4 It is held that one who has obtained a judgment against a defendant who afterwards becomes insane may have a new action upon his judgment.⁵ And, as

- ¹ Bush v. Pettibone, 4 N. Y. 300.
- ² Piggot v. Killick, 4 Dowl. Pr. Cas. 287. But where the warrant of attorney was given to secure the doing of a certain act on demand, the court refused to enter up judgment on proof of a demand made while the defendant was insane. Capper v. Dando, 4 Nev. & Mann. 335; s. c. 2 Ad. & El. 458.
- * Ibbotson v. Galway, 6 T. R. 133 and case cited; Anderson's Bail, 2 Chitt. 104; Bowerbank v. Payne, 2 Wash. C. C. 464. In Cock v. Bell, 13 East, 355, Lord Ellenborough refused to allow the time to be enlarged for the bail to surrender their principal on an affidavit that he was a lunatic, it not appearing that he was in such a state as to occasion any immediate peril of life, either to himself or those about him. But where the return of a writ of latitat stated that the defendant was insane and could not be removed without great danger, and he continued insane till the return of the writ, the court refused an attachment against the sheriff. Kavenagh v. Collett, 4 B. & Ald. 279. In Pillop v. Sexton, 3 Bos. & Pul. 550, a lunatic was ordered to be brought up from the asylum in which he was confined to be surrendered in charge of his bail, and being so surrendered was committed to the custody of the warden of the Fleet.
 - 4 Haskell v. Green, 15 Maine, 33.
 - ⁵ Adams v. Thomas, 83 N. C. 521.

insanity will not protect its subject against a civil action, it is held that a proceeding in bankruptcy is a species of action against which insanity cannot be a defence.¹

(c.) Service upon Insane Defendants.

- § 125. Service of a writ or process at common law, made upon an insane defendant, is valid.² But if such a defendant has been duly adjudged insane and a committee or guardian appointed for him, service should also be made upon the guardian or committee.³ In respect of service made by leaving a summons at the residence of the insane defendant, or with the person having him in charge not his guardian or committee, such service would appear to be invalid, unless at least it appear clearly that knowledge of the service was conveyed to the defendant.⁴ But the fact that a summons is left with an attorney at law, who afterwards, in behalf of the defendant, acknowledges service of the process, is held sufficient to raise
 - ¹ Anonymous, 13 Ves. 590.
- Doe dem Gibbard v. Roe, 3 Mac. & G. 87; s. c. 9 Dowl. Pr. Cas. 844. In California it was provided by the Practice Act of 1850, § 29, Heller's G. L. § 3803 (amended by Sts. 1861, p. 496), that where a party was insane, and no guardian had been appointed for him, he should be served personally. See Sacramento Savings Bank v. Spencer, 53 Cal. 737.
- * Heller v. Heller, 6 How. Pr. 194, and authorities cited. In Pennsylvania it is provided by statute that every writ against a person found to be a lunatic shall be served upon the committee of the estate if there be one, or, if there be none, then upon the committee of the person. Before the writ issues in such a case there should be a suggestion of record of the inquisition of lunacy and the name of the committee. A writ against a lunatic without such a suggestion is irregular, and the service of it void, even though made on the committee. Hulings v. Laird, 21 Penn. St. 265; and see Snowden v. Dunlavey, 11 Penn. St. 522.
- Doe dem Brown v. Roe, 6 Dowl. Pr. Cas. 270 (1838). In this case it was held that, in ejectment, judgment cannot be signed against the casual ejector, in respect of a service on the daughter carrying on the business of the tenant in possession, who is a lunatic and confined away from the premises. But in Doe dem Aylesbury v. Roe, 2 Chitty, 183 (1815), judgment was entered against the casual ejector, where the service of the declaration was made on a person who had the care of tenant in possession (a lunatic), and the management of his affairs, though not appointed by a regular committee.

a presumption that the service duly reached the hands of the defendant. Thus where a copy of a declaration was left at the house of the insane defendant on the day before the term, and on the first day of the term a letter was received from the defendant's attorney dated the preceding day and acknowledging the receipt of the copy, this was held a sufficient service, although the defendant was at the time confined in a lunatic asylum. And where a summons was taken by the officer to the insane defendant's house, shown to and explained to his wife (he not being able to be seen), and the officer was referred by the wife to the defendant's son, who managed his business, and the summons was shown to the son, and an attorney afterwards appeared for the defendant, it was held that the service was sufficient.²

§ 126. In cases where personal service upon an insane defendant cannot for any reason be effected, it is apprehended that further proceedings will, in different jurisdictions, be regulated by the local statutes providing for further service when the original service was defective or insufficient,8 and, in the absence of legislation upon the subject, it would seem that the plaintiff is remediless. In England, before the passage of the Common Law Procedure Act, 15 & 16 Vict. c. 76, it was customary for the plaintiff in such cases to move for a writ of distringas directing the sheriff of the county to distrain the defendant's goods in order to enforce an appearance.4 And where a judge at chambers made an order directing an appearance to be entered for a lunatic defendant upon an affidavit of service of the writ, by leaving a copy with the keeper of the asylum in which the lunatic was confined, without a previous writ of distringas, the court set the order aside, Jervis, C. J., saying: "There is nothing like personal service here. There must have been either per-

¹ Doe dem Gibbard v. Roe, 3 Mac. & G. 87; s. c. 9 Dowl. Pr. Cas. 844.

² Stigers v. Bent, 50 Md. 214.

Thus in Sturges v. Longworth, 1 Ohio St. 544, the statute providing in general terms that constructive service might be made upon absent defendants by newspaper publication of the pendency of proceedings, it was held that cases of absent insane defendants came within the purview of the statute. See 1 Barb. Ch. Pr. 52.

⁴ Stimpson's Law Glossary, 116.

sonal service of the writ of summons, or the plaintiff must come for a distringus. The fact of the defendant being lunatic does not dispense with a distringus." The writ of distringas in such cases was served upon the keeper of the asylum or other person having the defendant in charge, its purport was required to be explained to such person, and the plaintiff, after such explanation and notice of his intention to enter an appearance for the defendant and to proceed to judgment and execution thereon, might, after making an affidavit to the necessary facts, enter such an appearance.2 And the fact that the copy of the distringas served upon the person in charge of the defendant contained a printed or written notice of the plaintiff's intention to enter an appearance for the defendant would not avoid the necessity of a verbal explanation of such intention to the person on whom the writ was served. Now, the clause of the act 15 & 16 Vict. cited above provides that a plaintiff in civil cases may proceed as if personal service of a writ of summons had been effected, if it appear "that the writ has come to the knowledge of the defendant, or that he wilfully evades service of the same." And the clause is held applicable, by construction, to the case of a lunatic defendant, if it appear that reasonable efforts have been made to effect personal service, and that the writ has come to the defendant's knowledge.4

¹ Blake v. Cooper, 11 C. B. 680.

Humphreys v. Griffiths, 6 M. & W. 89; Branson v. Moss, id. 420; Rawson v. Moss, 8 Dowl. Pr. Cas. 412; Jones v. Evans, id. 425; Lambert v. Hayward, 2 Dowl. & Lowndes, 406; s. c. 13 M. & W. 480; Banfield v. Darell, 2 Dowl. & Lowndes, 4; Dodson v. Warne, 1 Dow. Pr. Cas. N. s. 848. But see the earlier case of Starkie v. Skilbeck, 6 Dow. Pr. Cas. 52 (1837), in which the defendant being insane, and a distringas having issued to which there was a return of nulla bona and non est inventus, and affidavits were produced that the defendant was a lunatic, and that it was known where he was living, but that his keeper refused to allow him to be seen in order that process might be served, the court refused to allow an appearance to be entered for him.

^{*} Spiller v. Benson, 1 Dowl. & Lowndes, 650; s. c. 12 M. & W 425.

⁴ Kimberly v. Alleyne, 2 H. & C. 222. A dictum of Jervis, C. J., contained in the report of Holmes v. Service, 15 C. B. 293, appears to express a different view of the statute. And in Williamson v. Maggs, 28 L. J. M. S. Exch. 5, the keeper of the asylum in which the insane defend-

§ 127. The rules applicable in the service of common-law process are generally applied to the service of process issuing in equity against insane respondents. Thus, under a general order in chancery providing for service of the writ of subpœna upon defendants without the jurisdiction of the court, such service was ordered upon a defendant of unsound mind, not so found by inquisition. In making the order the Master of the Rolls said: "As nothing can be done upon the service without leave of the court, I think the motion ought to be granted. . . . Care should, however, be taken that no application is made to enter an appearance under the 4th article of Order 33, unless the defendant should have recovered at the time when the subpœna is served." It has, however, been doubted whether a party of unsound mind can be proceeded against by service of a copy bill.²

(d.) Defence, how made.

§ 128. In actions at law, due service of process having been made upon a lunatic defendant, he defends in the same manner as ordinary persons; that is, if he be an infant, he appears by his guardian, and if of full age, by attorney.⁸ In equity, the

ant was, having refused the plaintiff admission for the purpose of serving process on the defendant, the court refused to allow the plaintiff to proceed in the suit without service.

- Biddulph v. Lord Camoys, 7 Beav. 580. See Saumarez, in re, 8 De G. M. & G. 390. In Cates v. Woodson, 2 Dana, 452, it was held that, on a bill against an insane defendant in custody of a committee, service of process upon the committee was sufficient, and that it was improper to subpæna the defendant himself. See also Brasher v. Van Cortlandt, 2 Johns. Ch. 242, and contra, Mitf. Eq. Pl. 29, 94.
 - ² Pemberton v. Langmore, 8 Beav. 166.
- Beverley's Case, 4 Coke, 124 b; Northington, ex parte, 37 Ala. 496; King v. Robinson, 33 Maine, 114; 1 Chitt. Pl. 427, 428; 1 Tidd Pr. 92, 93; Van Horn v. Hann, 10 Vroom, 207; Cameron's Committee v. Pottinger, 3 Bibb (Ky.), 11; Buchanan v. Rout, 2 Mon. 114. In Beverley's Case, supra, it was said that "an idiot in an action brought against him shall appear in proper person; . . . otherwise it is of him who becomes non compos mentis, for he shall appear by guardian if he is within age, and by attorney if he is of full age." And see Attorney General v. Tiler, Dickens, 378; Amos v. Taylor, 2 Brev. (S. C.) 20; Cameron's Committee

by the court, which guardian will ordinarily be the lunatic's committee or guardian, if one has been appointed. It is held to be error for the court to enter a decree against an insane respondent, no answer having been filed by his guardian ad litem. So upon a motion made to take a bill pro confesso against the guardian ad litem of a lunatic, the order was made on the terms of serving notice upon the lunatic's nearest relations and on his guardian. It is not the practice to appoint a person resident abroad to be a guardian ad litem. But such a guardian will, if necessary, be appointed for a lunatic defendant out of the jurisdiction. In England, where a defendant is of unsound mind, not found so by inquisition, and the plaintiff applies for the appointment of a guardian ad litem, the practice is to appoint the solicitor to the suitor's

- v. Pottinger, supra; King v. Robinson, supra. But it is apprehended that the rule stated in the text is now taken to apply to all classes of insane persons.
- ¹ Leving v. Caverly, Finch, Prec. in Ch. 229; Westcomb v. Westcomb, Dick. 233; Wilson v. Grace, 14 Ves. 172; Rothwell v. Bonshell, 1 Bland's Ch. 373, n.; Post v. Mackall, 3 Bland's Ch. 486; Van Horn v. Hann, 10 Vroom, 207; New v. New, 6 Paige, 237; Ward v. Kelly, Smith (Ind.), 74. In Thomas v. Howorth, Tothill, 130, a lunatic defendant in a chancery proceeding was permitted to answer by his friend. Where an insane defendant was in prison on execution, and his wife had given proper notice to the plaintiff that she should apply for his discharge under the statute, and she applied.accordingly, it was held that the court might act upon the wife's application and discharge the defendant. Clay v. Bowler, 5 Ad. & El. 400; s. c. 6 Nev. & Mann. 814, 2 Harr. & W. 283. In a capital case, the defendant showing signs of insanity and consequent inability to conduct his own defence, the court appointed his son to make defence for him. Bateman's Case, 11 St. Tr. 468 (1685). In Markle v. Markle, 4 Johns. Ch. 168, a female defendant, unmarried, above sixty years old, and who had been deaf and dumb from her infancy, was admitted to appear and defend by guardian.
- ² Sturges v. Longworth, 1 Ohio St. 544; Carew v. Johnston, 2 Sch. & Lef. 803.
- * Crawford v. Kernaghan, 1 Drury & Walsh, 195; and see Peto v. Attorney General, 1 Younge & J. 509. For the form of an order on a motion to take a bill as confessed against a defendant alleged to be of unsound mind, see Swift r. Swift, 11 Ir. Eq. 557.
 - 4 Hartland v. Atcherley, 7 Beav. 53.
 - ⁵ Hill v. Averill, 4 Ir. Law Rec. n. s. 49.

fund; but if the application be made by the family of the defendant, this practice does not prevail, and any suitable person may be appointed.¹

§ 129. If the committee or guardian of the lunatic appear to be interested in the subject-matter of the controversy, another person will be appointed as guardian ad litem.2 When the defendant in a suit at law is, by reason of his insanity, incompetent to appoint an attorney, the court will, on motion, appoint one for him.⁸ A guardian ad litem may be appointed for a defendant, not found insane by inquisition, upon affidavit duly made of his insanity; but no such appointment should be made without service of notice on the alleged lunatic, and an appointment made as of course is irregular.4 When a guardian ad litem is appointed for an insane respondent, it is said that the court imposes on the latter all the restraints of infancy, and the party is bound by the acts of the guardian so appointed. The court, having evidence that such persons are incapable of protecting their own interests, treats them as infants or as insane, though not so found by inquisition; and being satisfied that their next friend or guardian pays proper attention to their interests, and making all necessary inquiries to ascertain their rights and what is beneficial for them, or, if necessary, directing that a commission may be applied for them, ultimately deals with their rights and property as justice may require. Upon a suggestion that the defendant

- ¹ Charlton v. West, 3 De G. F. & J. 156; Pope, Lun. 311 et cit.
- ² Snell v. Hyatt, Dickens, 287; Lloyd v. —, id. 460; Lyon v. Mercer, 1 Cond. Ch. Rep. 182; Hewitt's Case, 3 Bland's Ch. 184.
 - * 1 Coll. Lun. 341; Faulkner v. M'Clure, 18 Johns. 134.
- 4 Howlett v. Wilbraham, 5 Madd. 423; Brooks v. Jobling, 2 Hare, 155; Needham v. Smith, 6 Beav. 130; Piddock v. Smith, 9 Hare, 395. See Sackvill v. Ayleworth, 1 Vern. 105; Tomlinson, ex parte, 1 Ves. & Bea. 58; Pope, Lun. 308. But it is held that actual service of process in the suit on an insane defendant, so found, is not necessary as a prerequisite to the appointment of a guardian ad litem, when it is made to appear that such service would be dangerous to the health of the lunatic. Speak v. Metcalf, 2 Tenn. Ch. 214.
- ⁵ Nelson v. Duncombe, 9 Beav. 211. Under the practice in New York the Supreme Court has power, by an ex parte order made on a petition of a near relative, in an action pending therein, to appoint a commissioner or guardian, for the purpose of such action, of a person of unsound mind,

in a suit at law has become insane during the litigation, the court may continue the case in order to give an opportunity for an inquisition of lunacy to be had; and it is held that the court will not proceed to appoint an attorney for the defendant until the inquisition has pronounced him insane. When a like suggestion is made in an equity proceeding, the court, before appointing a guardian ad litem for the defendant, may order a reference to a master to report as to the defendant's condition, and physicians may be called to assist in the inquiry, if necessary. When the attorney of an insane defendant ceases to act, the notice to substitute another attorney should be served on the defendant's committee.

§ 130. When a lunatic is sued in equity, his committee or guardian must be joined as a party; and if a defendant in such a suit become insane during its progress, the bill should be amended to bring in the committee as a party, or a supplemental bill should be filed against the original defendant and the committee.⁴ It is said that, in a suit in equity in personam against the committee, the lunatic should not be deemed an indispensable, though he may be a proper, defendant,⁵ in order that the proceedings may be binding upon him in case he should be restored to the possession and control of

where such unsoundness is shown by affidavit, and although no commission de lunatico inquirendo has issued. And the appointment of a special guardian for a party as a lunatic, upon an allegation of a petitioner in a proceeding for another purpose, is a mere matter of routine and not an adjudication of lunacy, and upon proof that lunacy does not exist the order of appointment may be vacated. Hunter v. Hatfield, 12 Hun, 381; Spencer v. Popham, 5 Redf. 425.

Where an application was made to appoint a solicitor guardian ad litem to an insane defendant not so found by inquisition, the court required to be first satisfied that no relation of the insane party would undertake the defence. Moore v. Platel, 7 Beav. 583.

- ¹ Hollingsworth v. Chapman, 50 Ala. 23; Nelson v. Duncombe, ubi supra.
 - ² Campbell v. Bowen, 1 Rob. 241.
 - * Den v. Southworth, Spencer, 115.
- ⁴ Snell v. Hyatt, Dick. 287; Lyon v. Mercer, 1 Sim. & Stu. 356; Search v. Search, 11 C. E. Green, 110.
- ⁵ Berry v. Rogers, 2 B. Mon. 308; Brasher v. Van Cortlandt, 2 Johns. Ch. 205.

the estate before the termination of the suit.¹ So under the rules obtaining in the courts of equity in New York, which courts have jurisdiction to satisfy the just claims of the lunatic's creditors, it was held, upon a bill filed by a creditor of a lunatic against the committee to obtain payment of the debt out of the estate, that it was not necessary to make the lunatic a party. But the court said that in a suit where there appears to be conflicting interests between the lunatic and his committee, which must be settled in the cause, both the lunatic and committee should be made parties.²

- § 131. Unsoundness of mind of a defendant, existing to such an extent as to render him incapable of transacting or understanding business, is sufficient cause to justify the setting aside his default of appearance in a civil suit. But it seems that, in civil as well as in criminal proceedings, the insanity of a party at the time of trial is not a ground for granting a new trial upon his restoration to sanity, unless it is made to appear to the court that a new result would probably be reached if a new trial were granted, and that, by reason of the party's incapacity, injustice was done him on the former trial.
- § 132. Although it is clearly a rule of the common law that a lunatic defendant of full age is to appear by attorney in an action brought against him, the rule has been often departed from in practice, or changed by statutory enactment.
 - ¹ Beach v. Bradley, 8 Paige, 146.
- ² Teal v. Woodworth, 3 Paige, 470. In Lyon v. Mercer, supra, after decree in a suit in which the lunatic and his committee were defendants, the committee died, and a new one was appointed, who was ordered to be named as such in the further proceedings in the case. Where a new committee was appointed pending a suit, the court declined, before decree, to make an order substituting the new committee for the former committee as defendant in the suit. Rudd v. Speare, 2 De G. & Sm. 374. Where the inquisition against an insane defendant was set aside and the defendant restored to the management of his estate, the order appointing the guardians to defend was discharged; and it was held that, as the defendant afterwards appeared by attorney, no process was necessary to bring him into court, and that the irregularity, if any existed, was waived by his appearance. Winston v. Moffet, 9 Port. (Ala.) 518.
 - * McClaine v. Davis, 77 Ind. 419.
 - 4 Bramhall v. The United States, 6 Ct. of Claims Rep. 238.

In Kentucky it is provided that actions against lunatics shall be defended by the committee or by a guardian ad litem; 1 and a similar statutory provision exists in Illinois, 2 in Indiana, 3 and in Tennessee. 4 In the Irish courts it appears to have been customary to appoint guardians ad litem for lunatic defendants in suits at law, 5 and such appointments have been made from time to time by different courts in the United States. 6 And although such appointments are in contravention to the strict rule of law, it appears that the plaintiff cannot demur, except for insufficiency, to an answer filed by a guardian so appointed, 7 or raise objections to the proceedings upon a writ of error. 8

§ 133. Upon libels for divorce or suits for nullity of marriage the courts have appointed guardians ad litem for insane respondents.9 But in an early case in Massachusetts, upon the suggestion of the respondent's counsel that she was insane, the court permitted the counsel to plead to the libel in

- ¹ Civil Code Ky. § 60. See McNees v. Thompson, 5 Bush, 686.
- ² Rev. Sts. 1883, c. 86, § 13.
- Symmes v. Major, 21 Ind. 443; Yount v. Turnpaugh, 33 Ind. 46. But it was held in the latter case that in a suit against a husband and wife to foreclose a mortgage made by them, where the husband at the time of the suit was insane, and the wife appeared and answered in her own right and on behalf of her husband, and the plaintiff, without objecting to the right of the wife to appear and defend for the husband, took issue on the answer and voluntarily went to trial thereon, that the defendant could not be permitted to raise the objection in arrest of judgment, although "it was evident error in the court . . . to allow the wife to appear and defend for the husband."
- ⁴ Statutes 1871, § 4372. See Speak v. Ransom, 2 Tenn. Ch. 210; Same v. Metcalf, id. 214.
- ⁵ Mauleverer v. Warren, 2 Jones, Exch. 47; O'Brien v. Mahon, C. & D. Abr. Notes, 138.
- ⁶ See Van Horn v. Hann, 10 Vroom, 207, 213, where the subject is considered with great thoroughness, and the general rule stated in the text approved; Mitchell v. Kingman, 5 Pick. 431; Sturges v. Longworth, 1 Ohio St. 544.
 - ⁷ Micklethwaite v. Atkinson, 1 Col. C. C. 173.
 - Walker v. Clay, 21 Ala. 797.
- Montgomery v. Montgomery, 3 Barb. Ch. 182; Mansfield v. Mansfield, 13 Mass. 412.

the name of the respondent. The statute of that state now provides that if at any time during the pendency of a libel the respondent is insane, the court shall appoint some suitable person as guardian to appear and answer in like manner as a guardian for an infant defendant in a suit at law.2 And it is held that the appointment of a guardian ad litem under this statute is prima facie evidence of the respondent's insanity in any subsequent stage of the case, since it is said that the provision clearly requires the court to determine judicially the fact of the insanity of the respondent, as a condition precedent to the exercise of the authority to appoint a guardian ad litem.8 In an English case, a petition having been presented for dissolving a marriage for reason of the respondent's adultery, and allegation and affidavits being made that she was insane and incapable of pleading, a guardian was appointed by the court to raise that question, and the issue was tried before a special jury.4 The jury having found that the respondent was in such a state of mind as to be unfit to answer the petition or to instruct an attorney for her defence, an order was made that no further proceedings should be taken in the suit until she recovered her mental capacity. After a period of two years, and on evidence that respondent was not likely to recover, the court, on application of the petitioner, dismissed the petition, so as to afford him an opportunity to appeal against the order.⁵ It was held, on appeal, that the order was right.⁶

(e.) Equitable Power to restrain Suits against Insane Persons.

§ 134. The English courts do not recognize any authority as inherent in the Court of Chancery to restrain suits at law brought, or enjoin judgments obtained in good faith and without fraud, against insane defendants, since the Chancellor's

- ¹ Broadstreet v. Broadstreet, 7 Mass. 474.
- ² Pub. Sts. Mass. c. 146, § 14.
- ³ Little v. Little, 13 Gray, 264. See Hall v. Hall, 3 Sw. & Tr. 347.
- 4 Mordaunt v. Mordaunt, L. R. 2 P. & D. 103.
- ⁵ Ibid. 382. ⁶ Ibid. 109.
- ⁷ See remarks of Lord Eldon in Steel v. Allan, 2 Bos. & Pul. 362, cited ante, § 124, n. Where a solicitor who had acted in some of the proceed-

authority in matters of lunacy is considered as a mere delegation of the royal prerogative, which cannot abridge the common-law liability of the subject. And similar views obtain in those American states where the jurisdiction over lunatics is considered to be derived from, or coincident in extent with, the jurisdiction in like matters of the Lord Chancellor of England. Thus the courts of Maryland hold that a lunatic may be sued at law for a debt contracted while of sound mind, and judgment thereon obtained against him, and that his insanity found is an insufficient ground in equity for declaring such judgment a nullity. And in South Carolina the defendant's insanity is said to be no ground for equitable relief from a judgment at law obtained against him, unless it be made to appear that he was not represented in the suit by his committee.

§ 135. But in those states where the entire jurisdiction over the persons and estates of lunatics is committed by statute or constitutional provisions to the courts of chancery jurisdiction contrary rules prevail. Thus in New York it was held to be a contempt of court even to commence a suit at law against a lunatic without permission, after office found and notice of the inquisition.⁵ It is the doctrine of the courts

ings under a commission of lunacy afterwards acted as attorney for a creditor of the lunatic, and as such levied an execution upon the lunatic's goods, it was held that the Lord Chancellor had jurisdiction to restrain the sale of the goods, upon the lunatic's committee giving security for the value of the goods, to be paid by instalments out of the income of the lunatic's property. Ball, in re, 2 Molloy, 145. See Anonymous, 13 Ves. 590; Rock r. Cooke, 1 De G. & Sm. 675; Stedman v. Hart, Kay, 607.

- ¹ See § 28, ante.
- ² See § 30, ante.
- Stigers v. Brent, 50 Md. 214. See Tomlinson v. Devore, 1 Gill, 345.
- 4 Henderson v. Mitchell, Bailey Eq. 113. A contrary doctrine to that stated in the text appears to have been held by Marshall, C. J. See Tabb v. Gist, 1 Brockenbrough, 33 (1802). And in this case the court is reported to have held that although a man may not be absolutely insane, so as to avoid his contracts, yet, if he labors under melancholy, it will excuse inattention to his affairs, and will authorize relief against judgments obtained against him during such a state of mind. No precedents were cited, and the view laid down is unsupported by authority.
- L'Amoureaux v. Crosby, 2 Paige, 422; Brasher v. Van Cortlandt, 2 Johns. Ch. 242; Swartwout v. Burr, 1 Barb. 495; Soverhill v. Dickson,

in that state that such proceedings, or a judgment obtained against one judicially pronounced insane, may be restrained by an injunction from the Court of Chancery; 1 and it is held that the fairness of a judgment obtained against a lunatic may be impeached in an equitable proceeding instituted for that purpose by the lunatic's committee.2 But proceedings in lunacy are not considered as placing the person of the lunatic beyond the jurisdiction of the courts of law; 8 nor, in the absence of equitable proceedings to annul the judgment, can an action be maintained by the lunatic's committee to recover the value of property levied upon and sold on execution issuing upon it, such judgments being held neither void nor erroneous in law, although obtained without leave of a court of equity.4 The courts consider that leave to sue the committee of the lunatic's estate ought to be granted when the party applying for such leave shows a case upon which a court of equity would grant relief if the claim of the party should be established on trial.⁵

§ 136. The principles governing this subject in the New York courts are thus stated in the leading case of L'Amoureaux v. Crosby: 6 1. After the finding of an inquisition declaring the incompetency of the lunatic, the proper remedy of creditors is by an application to the court by petition for the payment of their debts, if the committee decline discharg-

5 How. Pr. 109; Niblo v. Harrison, 9 Bosworth, 668; Williams v. Cameron's Estate, 26 Barb. 172. But where a judgment is obtained against a lunatic, and an execution issued and levied upon his property before the institution of proceedings in lunacy in the Court of Chancery, the court will not set aside the judgment and execution upon a summary application of the committee, although such judgment and execution are overreached by the finding of the jury upon the commission of lunacy. Hopper, in re, 5 Paige, 489.

- ¹ Heller, in re, 3 Paige, 190; Hopper, in re, ubi supra; Roberts v. Lain, 19 Wend. 649; Sternberg v. Schoolcraft, 2 Barb. 153; Crippen v. Culver, 13 Barb. 424.
- ² Demelt v. Leonard, 19 How. Pr. 140. See Loomis v. Spencer, 2 Paige, 153; Person v. Warren, 14 Barb. 488.
 - * Sternberg v. Schoolcraft, 2 Barb. 153.
 - 4 Crippen v. Culver, 13 Barb. 424.
 - ⁵ Wing, in re, 2 Hun, 671.
 - ⁶ 2 Paige, 422.

ing them without the direction of the court; and, if their demands are disputed or doubtful, these may be referred to a master to ascertain whether they are equitably due. 2. It is not proper to subject the estate of a lunatic to the expense of a proceeding by bill against his committee, except by direction of the court, and it is a contempt of the court to commence a suit at law without permission. 3. The statute having given to the Court of Chancery the exclusive jurisdiction in such cases, and charged it with the duty of providing for the payment of the debts of the idiot, lunatic, or drunkard out of his estate, and of seeing that the legal and equitable rights of the creditors are protected and enforced, this must be done according to the usual forms of proceedings in this court or under its direction.

§ 137. In Brasher v. Van Cortlandt, Chancellor Kent laid down the following rules to be followed in the conduct of sales made by order of the court: 1. A creditor of a lunatic may file a bill for the payment of his debt against the committee of the lunatic, without making the lunatic himself a party. And where the lunatic was named as a party in the bill with his committee, and the subpæna issued in a cause entitled against the lunatic alone without naming them as committee, and they entered their appearance in the cause as so entitled, while the plaintiff proceeded in the cause as entitled in the bill and took the bill pro confesso for want of an answer and went on to a final decree, he held that the committee were too late to object to the irregularity after taking a copy of the bill and tacitly suffering the plaintiffs to go on to a 2. The real estate of a lunatic may be sold for the decree. payment of his debts on a bill filed by a creditor for that purpose, without a petition of the committee of the lunatic, under the act concerning idiots and lunatics; but the sale is to be conducted under the directions of the court by a master, and the committee of the lunatic and the terms of sale, &c., must be reported to the court for its approbation before any conveyance is executed. The proper remedy for the creditor of a lunatic is in this court, which has the sole custody of his real estate, and not by an action at law.

¹ 2 Johns. Ch. 242.

3. Where a creditor wishes to obtain payment of his debt out of a lunatic's estate, and no inventory of the estate has been filed by the committee of the lunatic, according to the statute the proper course is to cause the committee, by citation or otherwise, to file the inventory, and to present a petition to the court stating the amount of the estate, debts, &c. Where the real estate of a lunatic is ordered to be sold, the sale is to be conducted by the committee, not by the master; but he or some other person may be joined with the committee for that purpose and to execute the conveyance. The court in New York having a like jurisdiction over lunatics and habitual drunkards, the same rules are applied in case of the latter as regards the power of chancery to restrain suits or order payment of debts due from the drunkard.¹

§ 138. In Pennsylvania, while the court may not interfere to restrain a suit at law commenced against insane defendants, so found by inquisition, it will restrain a levy upon an execution obtained in such a suit.2 Thus where judgment had been entered against a defendant in regard to whom proceedings were pending in another court on a writ de lunatico inquirendo, and, a few days after judgment, inquisition was found that the defendant was of unsound mind, the court opened the judgment so as to let in a defence, and set aside the execution issued on it. But the judgment was ordered to stand as security until further proceedings. The court said: "The act is peremptory that judgment shall be rendered. . . . A statute, however, has relation to the general principles of the law, and is only presumed to operate in cases where the parties are competent to appear in a court of justice. . . . The defendant was incapable of being a party, And later, in a carefully considered in the eye of the law." 8 case, the Court of Common Pleas held (1) that its authority

¹ Beach v. Bradley, 8 Paige, 146.

² See § 37, ante, and cases cited, also Bolling n. Turner, 6 Rand. 399, in which case a dictum occurs to the effect that after office found an execution cannot issue against a lunatic's estate, that being under the control of the Chancellor, who may, however, direct the debt to be paid out of the estate.

⁸ Ash v. Conyers, 2 Miles, 94.

over lunatics was not derived from the statutes conferring equity jurisdiction upon the court, but from the constitution of the commonwealth; (2) that, at law, in England actions could be prosecuted against lunatics, who there possessed no exemption from arrest; (3) that in Pennsylvania it was incompetent for a creditor to levy execution on a lunatic's personal property in the hands of his committee, the creditor's only remedy being by application to the court, who would order the committee to raise the necessary funds; and (4) that an injunction would issue to restrain a creditor who should attempt to levy such an execution.²

(f.) Relief at Law from Judgments obtained.

§ 139. Although a judgment obtained against an insane defendant is not void, it has been held in several American cases that such a judgment may be set aside as erroneous, when it appears to have been rendered upon the defendant's default, or when his committee or guardian were not joined as party defendant. Thus where a judgment was rendered on default against one admitted to have been insane during the time of the proceedings had in the case, it was held that the judgment would be reversed on a writ of error brought by the defendant's administrator. The court say that the case is to be distinguished where the fact of unsoundness of mind was not admitted, and where the defendant appeared by attorney, and judgment was rendered after trial and verdict. And where a judgment had been rendered against a lunatic upon process served upon him only, his committee not having

¹ Const. Penn. art. 5, § 6.

Eckstein's Estate, 1 Clark, 224. But the court also held that, under the statute (Act 1836, § 45), a suit brought in good faith against a lunatic is conclusive as to the amount and merit of the demand. In Wright's Appeal, 8 Penn. St. 57, it was held that creditors of an insane defendant who may obtain judgments after inquisition found do not thereby acquire any prior rights as against other creditors of the lunatic.

Leach v. Marsh, 47 Maine, 548; and see Smith v. Rhodes, 29 Maine, 361. In Harmstead v. Kingsley, 3 W. N. C. (Penn.) 64, where a defendant had been found insane after a judgment obtained against him, an attachment made upon the judgment was dissolved on motion.

[•] Referring to King v. Robinson, 33 Maine, 114.

been made a party to the suit, it was held that such a judgment, though not void, was erroneous. The court said that if the fact of the lunacy appeared of record in such a case, it would be ground for reversal of judgment, and that if the fact did not so appear the judgment might be set aside on writ of error coram vobis.¹

§ 140. In a case occurring in New Hampshire, the doctrine was further extended, and it was held that the insanity of a defendant at the time of the service of the original process upon him and until judgment rendered, whether the defendant appears personally, or by attorney, or not at all, is good cause for the reversal of the judgment upon writ of error. But it is added that the judgment will be conclusive and cannot be impeached in a collateral proceeding, until so reversed.2 In Ohio it is held that a judgment obtained against an insane person without the intervention of a guardian or trustee, even if it be in favor of one having knowledge of the insanity, is not void, and that proceedings commenced to enforce such a judgment cannot be set aside by proof that the defendant was insane before the commencement of proceedings, unless it appear that some fraud or unfairness was practised upon the defendant and that there was a valid defence to the original action.8 In New Jersey it is held that the estate of a lunatic may be proceeded against by attachment, and that the defendant need not appear and be defended by his next friend in order to render the judgment entered against him in the suit valid.4 And it would seem to be a rule sanctioned by the general weight of authority that relief from a judgment duly obtained against an insane defendant is to be obtained, if at all, by the intervention of a court of equity.

¹ Allison v. Taylor, 6 Dana, 87.

² Lamprey v. Nudd, 29 N. H. 299. In this case, after laying down the rule stated, Bell, J., said: "For reasons which we think inapplicable and without force here, and perhaps little creditable to the jurisprudence of an enlightened country, it seems not to have been so held in England." The learned judge cites in support of the decision, Allison v. Taylor, supra, and Robertson v. Lain, 19 Wend. 649, neither of which cases appears fully to support the conclusions of the court.

Johnson v. Pomeroy, 31 Ohio St. 247.

⁴ Weber v. Weitling, 8 C. E. Green, 441.

Thus it is held that an officer will be justified in proceeding with the levy of an execution issued on a judgment, even if he know that proceedings in lunacy are pending against the defendant, no injunction having issued to restrain proceedings in the suit at law.¹

SECTION III.

OF COSTS.

§ 141. At common law an insane party was liable in respect of costs as if he were sane, and the court refused to compel security for costs in error on the ground of the plaintiff in error being a lunatic.2 In suits in equity, where the matter of the allowance of costs rests generally in the sound discretion of the court, such discretion will be exercised in favor of insane persons, their guardians or committees, who are parties to such suits, as justice may seem to require. Thus it is said that a lunatic, or an idiot, who is made a party to a suit to settle the construction of a will, ought not to be left to pay his own costs out of property not derived under the will or from the testator. And where it appeared to be for the benefit of the inheritor, who was a lunatic, the court, on application of the plaintiff, after decree stayed the proceedings of another creditor in chancery and directed him to file a charge under the decree; the creditor consenting that if anything should be reported due to him, but not otherwise, the costs of the chancery proceeding should be included in the report.4 In suits instituted in behalf of the insane person by his guardian or committee, in good faith and upon reasonable grounds, the guardian or committee will not be chargeable for costs, though the suit be unsuccessful, the courts applying to such cases the principle which relieves trustees acting reasonably and in good faith from liability for losses to their cestuis que trust by reason of such action.5

¹ Rau v. Katz, 26 La. Ann. 463.

² Steel v. Allan, 2 Bos. & Pul. 437.

^{*} King v. Strong, 9 Paige, 94.

⁴ Lynch v. Skerrett, 2 Jones Exch. 508.

⁵ Alexander v. Alexander, 5 Ala. 517; Sanford v. Phillips, 68 Maine,

SECTION IV.

INSANITY A GOOD PLEA BY AN INSANE PARTY.

- § 142. It was at one time held as a rule of the English law that a person who had been non compos mentis could not insist upon his insanity in avoidance of any act done by him while insane, since he should not be admitted to stultify himself. But this disability did not extend to the heir or personal representative of the deceased lunatic in respect to acts not of record.
- § 143. This rule has never been applied to the decision of any reported case in the United States, although it has been recognized as possibly sound in certain obiter dicta. And in
- 431. In the latter case it was held, where, after the commencement of a suit, the defendant was adjudged insane and a guardian appointed, by whom the estate was rendered insolvent, and the suit defended, that the guardian was not liable for costs under Rev. Sts. c. 67, § 15.
- ¹ Stroud v. Marshall, Cro. Eliz. 398; Thompson v. Leach, 1 Ld. Ray. 313; Beverley's Case, 4 Co. 126.
- ² Attorney General v. Parkhurst, Chan. Cas. 113; Lord Kenyon, in Attorney General v. Woolwich, id. 152; Anonymous, Jenkins, 40. The report in the latter case, stating the grounds on which the rule was supposed to rest, is as follows: "No man shall be received to avoid his deed by alleging that he was non compos mentis at the making of it; for such an allegation is repugnant in itself, for, if he was non compos mentis when he made the deed, he can't know it, because he was non compos mentis. And this would also open a gate to dissimulation, deceit, and fraud. Nemo admittendus est inhabilitare se ipsum. The King, who is the common parent, upon office found of lunacy or non compos mentis or fatuus natus, shall avoid all acts not of record which such a person has done. Fitz., in his N. B. 202, is of opinion that a person non compos mentis shall avoid his own act; it seems that, then, in the time of H. 8, it was not taken for a maxim of the law, That no man should disable himself by being non compos mentis, but the reasons before alleged have prevailed, and now it is received as a maxim in law. But the King, during his custody, and the heir after the death of his father, for the inheritance, and the executors, for the testamentary estate, shall avoid the respective acts not of record of a person non compos mentis, or an ideot or lunatick."
 - ⁸ Anonymous, Jenkins, 40; Lazell v. Pinnick, 1 Tyler, 247.
 - 4 See Lazell v. Pinnick, ubi supra; Jenkins v. Jenkins, 3 Mon. 327;

a case occurring in 1808, the Supreme Court of Connecticut, in an exhaustive opinion containing a full review of the English cases on the subject, held that a man might show his own insanity in avoidance of his deed. So in Maryland, in 1826, the court considered the English rule, and rejected it as being inconsistent with the principles of the law of that state.2 In Massachusetts the rule was made the subject of elaborate argument, based upon a full citation of the authorities, and the court held that a person might plead the fact that at the time of making a contract he was non compos mentis, or show such fact in evidence under the general issue in avoidance of the contract. In the opinion by Wilde, J., it is said: "It appears therefore, on examination, that the supposed maxim of the common law relied on by the plaintiffs (i.e. that one non compos cannot plead his incapacity) is of doubtful origin and authority. Nor should we feel ourselves bound to adopt it, although it were supported by less questionable English authorities, because the property and interests of idiots and lunatics are not protected here, as they are in England by the royal prerogative. There, if an idiot alien his lands, the King, after office found, may upon scire facias against the alienee recover the lands to the use of the idiot, and thereupon they And so if the idiot be sued in any will revest in him. action upon a bond or other contract, the King, by his writ, shall send a supersedeas to the justices where the suit is commenced. And the law is the same where a person becomes non compos." 8 The view of the law on this subject expressed in the authorities already cited has been adopted in all succeeding cases in the United States.4

Breckenridge v. Ormsby, 1 J. J. Marsh. 236; and see M'Creight v. Aiken, Rice, 56; Stewart v. Spedden, 5 Md. 434.

- Webster v. Woodford, 3 Day, 90. And see Lang v. Whidden,
 N. H. 435 (1822).
 - ² Colegate D. Owing's Case, 1 Bland's Ch. 870.
 - Mitchell v. Kingman, 5 Pick. 431.
- ⁴ Seaver v. Phelps, 11 Pick. 304; Allis v. Billings, 6 Met. 415; Den v. Moore, 2 South. 470; Thornton v. Appleton, 29 Maine, 298; Rice v. Peet, 15 Johns. 503; Taylor v. Dudley, 5 Dana, 308; Tolson v. Garner, 15 Mo. 494; Morris v. Clay, 8 Jones, 216; McCormick v. Littler, 85 Ill. 62; Crawford v. Scovell, 94 Penn. St. 48. In the latter case the court

§ 144. The rule that a party shall not be admitted to plead his own incapacity has often been questioned in England. Thus in 1729, upon a bill by a lunatic and his committee to set aside a settlement, which bill was demurred to on the ground that the party could not be allowed to stultify himself, the Lord Chancellor overruled the demurrer, and said that the rule was understood to apply to acts done by the lunatic to the prejudice of others, in order that he should not be admitted to excuse himself on pretence of lunacy, but that it did not apply to acts done by him to the prejudice of himself.1 A few years later it was held that the fact of a defendant's lunacy might be given in evidence upon a plea of non est factum.2 In a leading case upon the subject of lunatics' civil liability, occurring in 1826, the court, in an opinion by Abbott, C. J., avoided passing upon the question of the soundness of the rule.⁸ The following year, in an action of assumpsit for work and labor against an insane defendant, Lord Tenterden said: "I am not unwilling to receive the evidence offered [i. e. of]insanity]. I think, however, the defence will not avail unless it be shown that the plaintiff imposed on the defendant. The old cases go the length of saying that a party shall in no case be allowed to set up his own insanity. That, I think, is too general a rule; if you can show that any means were used to impose upon a person of weak or unsound mind, I think that in this, as in all other cases of fraud, it is an answer." 4 The modern English view of the subject may be

- ¹ Ridler v. Ridler, 1 Eq. Cas. Abr. 279.
- ² Yates v. Boen, 2 Strange, 1104. See also Cole v. Robins, Buller N. P. 172.
 - ⁸ Baxter v. Portsmouth, 2 C. & P. 178.
- ⁴ Browne v. Joddrell, Moo. & Malk. 105. Another report of this case is given in 3 C. & P. 30, where the following is printed as the whole opinion of Lord Tenterden: "I think this defence cannot be allowed, and that no person can be allowed to stultify himself, and to set up his own lunacy as a defence. If, indeed, it can be shown that the defendant

says: "A committee cannot be appointed to bring suit for a sane man because at one time he was a lunatic. He must bring suit himself to recover his rights, and may prove insanity to avoid a deed set up against him on the same terms as if he were defendant in the action and the plaintiff were supporting his case with the same deed."

stated to be that the rule that no man should be allowed to stultify himself and avoid his acts, on the ground of his being non compos mentis, is so far relaxed that unsoundness of mind may be a good defence to an action upon a contract, if it appear that the defendant was mentally incapable of contracting, and that the plaintiff knew it.¹

SECTION V.

OF LIMITATIONS AS AFFECTING INSANE PARTIES.

(a.) As to Insane Defendants.

§ 145. Since legal liabilities may be enforced against insane persons, the insanity of a defendant will not, in the courts of law, take the claim against him out of the operation of the statute of limitations; and this is the rule whether the defendant's mental incompetency has been determined judicially or not.² Thus in an action brought by the creditor of an insane person under guardianship, upon a judgment rendered on the probate bond of the guardian, in which action the creditor alleged that the insane defendant, previous to the appointment of his guardian and more than six years before the beginning of suit, assumed the liability declared on, it was held that non assumpsit infra sex annos was a good plea in defence.8 And under a statute requiring the joinder of the insane person and his guardian as defendants in suits to enforce claims against the former,4 suit being brought against the guardian alone, and the ward being subsequently joined as defendant by leave of the court, it was held that bringing of suit against the guardian alone did not stop the running of the statute of limitations in favor of the insane defendant.5

has been imposed upon by the plaintiff, in consequence of his mental imbecility, it might be otherwise, and such a defence might be admitted."

- ¹ Pollock, C. B., in Molton v. Camroux, 2 Exch. 487; and see Gore v. Gibson, 13 M. & W. 623, and reporter's note.
 - ² Sanford v. Sanford, 62 N. Y. 553.
 - * Aldrich v. Clark, 12 Vt 413.
 - Miss. Code 1871, § 705.
 - ⁶ Potts v. Hines, 57 Miss. 735.

§ 146. In the English courts of equity different rules have been applied in suits brought to enforce claims against the estates of deceased persons judicially pronounced insane, it being held in such cases that the lapse of six years, during the lunatic's life, will not bar a claim of this description, since the Court of Chancery will take judicial notice, in a suit to obtain payment out of his assets after his death, of the fact that an action against the lunatic in his lifetime for the recovery of the claim would have been restrained by the Lord Chancellor on petition in lunacy. Thus where an action in contract was commenced against one who, pending the suit, was judicially declared a lunatic, and by his committee filed a bill to restrain the action, and afterwards the action was stayed by consent and the plaintiff proceeded to establish his claim under the lunacy, but before the master's report upon the claim was filed the defendant died, it was held, upon a creditor's bill filed by the plaintiff against the defendant's executor, that the statute of limitations did not run against the plaintiff.2 But in a similar case, the master having filed a report before the defendant's death, which did not include the name of the plaintiff as one of the creditors of the defendant, it was held that the plaintiff was not entitled to be relieved from the effect of the statute of limitations.8

(b.) As to Insane Plaintiffs.

§ 147. It has been held that, in the absence of statutory provision saving such cases, the statute of limitations will run against a plaintiff notwithstanding the fact of his insanity. Thus in a suit brought on behalf of a lunatic for rent due more than six years after the claim had accrued, in which the statute of limitations (3 & 4 Wm. IV. c. 27, § 42) was pleaded in defence, it was held, no express exception appearing in the statute in favor of lunatics, that the claim was barred. On the other hand, it appears to have been held

¹ Stedman v. Hart, Kay, 607.

² Rock v. Cooke, 1 Col. C. C. 477.

^{*} Rock v. Cooke, 1 De G. & Sm. 675.

⁴ Humfrey v. Gery, 7 C. B. 567. The grounds of the opinion are

that if one, while insane, is fraudulently induced to execute a conveyance of his property to another, the statute will not begin to run as against his right to commence an action to set aside the deed until he recovers his reason and discovers what he has done, although his rights are not saved by statute. And it has been further held that insane persons are not responsible for laches or delay in seeking any remedy in the courts, and are not affected by any statutes of limitations, whenever existing, which, but for their insanity, might have barred their rights. 2

§ 148. In England and many of the United States the right of a plaintiff who has been disseized of land while insane to bring an action for the recovery of the same, is preserved by statute during the period of insanity, and for a certain term thereafter, free from the operation of the statute of limitations. And it is a question of fact for the determination of the jury whether the action has been brought within the time prescribed by the statute. Under the statutes of Massachusetts it is held that an easement in the land of an insane person cannot be acquired by prescription until the expiration of such time after his death or the removal of his disability as would bar an action, by him or his

not stated. In Hannum's Appeal, 9 Penn. St. 471, it was held that one found an habitual drunkard by inquisition could not revive a note barred by the statute of limitations.

- ¹ Crowther v. Rowlandson, 27 Cal. 376, 384. To the same effect see Dicken v. Johnson, 7 Ga. 484.
- ² Dodge v. Cole, 97 Ill. 338. Persons deaf and dumb, or of feeble intellect, but not non compotes mentis, do not come within the exceptions of the statutes of limitations. Christmas v. Mitchell, 3 Ired. Eq. 535.
- * St. 4 Wm. IV. c. 1. For American cases arising upon the operation of these statutes, see Bensell v. Chancellor, 5 Whart. 371; Cleveland v. Jones, 3 Strob. 479, note; Ward v. Dulaney, 23 Miss. 410; Alexander v. Daugherty, 69 Ind. 388; Lackey v. Lackey, 8 B. Mon. 107; Hayward v. Gunn, 82 Ill. 391. It was held in an early case that, at common law, a "lunatic sueth not livery, no mean rates run against him. And livery was due to him, and the law presumes that he would have sued, it being for his benefit if he had been compos mentis." Burcher's Case, Hobart, 137 (1618).

⁴ Cleveland v. Jones, 4 Strob. 479, n.

legal representatives, for the land, no matter how long such disability may continue.1

- § 149. If the insane party has been once restored to reason in such a degree and for such a length of time as to enable him to comprehend the nature of the act he has done, the statute of limitations will run against him, and continue to run, notwithstanding that insanity again supervene. This rule, which had already been applied to cases of disability other than insanity, was settled in an early case,² and does not appear to be disputed. The length of time during which the same interval must continue, in order to enable the party in any case to examine his affairs understandingly and institute an action for the recovery of his rights, is to be determined by the jury as matter of fact.⁸
- § 150. One disability, as of infancy, cannot be grafted upon another, as of insanity, so as to avoid the effect of the statute of limitations. Thus where the statute provided that an action for the recovery of land might be brought within ten years after the removal of the disabilities of insanity or infancy, and it appeared that A., in 1799, while insane, devised real estate to B. for life, and to B.'s children in fee, and afterwards, in 1803, while still insane, conveyed the same by deed to C., and died in 1805, and in 1827 B. died, and in 1831 B.'s children brought ejectment against parties holding under mesne conveyances from C., —it was held that the statute ran from the time of A.'s death in 1805, although the plaintiffs were infants at that time.4
 - ¹ Edson v. Munsell, 10 Allen, 557.
- ² Doe v. Shane, 4 T. R. 306, note (b). And see Clark v. Traill, 1 Met. (Ky.) 35; Allis v. Moore, 2 Allen, 306. In the latter case it was decided that the Massachusetts statute, Rev. Sts. c. 119, \S 1 (Pub. Sts. c. 196, \S 1), did not suspend the operation of the statute of limitations in cases where the insanity of the party disseized had supervened after his right of action against the disseizor accrued.
- * Clark v. Traill, ubi supra. In this case it was said that the saving of the statute of limitations applies to the disability arising out of unsoundness of mind, and does not embrace the disability to alien and control one's estate, which the law may create for the protection of persons who are found by inquest to be of unsound mind, and which may continue long after the unsoundness of mind has ceased.
 - ⁴ Bensell v. Chancellor, 3 Whart. 371. In Doe v. Teal, 7 U. C. Q. B.

870, it appeared that in 1822, A., being insane, conveyed land to B., who then entered into possession. A. died in 1826. C., his eldest son and heir, became of age, and died in 1829; and his brother and heir, D. (the lessor of plaintiff), became of age in 1831, and brought ejectment against B. on the ground of his father's insanity at the time of executing the deed in 1822. D. brought his action more than ten years after the lunatic died and after he himself came of age, and more than five years after the statute 4 Wm. IV. c. 1. It was held that D., under these facts, was barred from recovery by the statute of limitations, and, also, that B. could not be considered in possession as the servant or bailiff of the lunatic.

CHAPTER VII.

RULES APPLIED IN DECIDING THE ISSUE OF INSANITY.

SECTION L

LAW AND FACT.

(a.) General Rule.

§ 151. It may be stated as a general rule that the question of the legal effect of insanity proved to exist in any case, as qualifying the nature of the act which is the subject of inquiry, is for the court, as being a question of law; and it follows that it is the duty of the court to embody the law, as applied to the evidence of insanity produced, in suitable instructions to the jury; and that it is the duty of the jury to receive the law as given by the court, and to decide, as matter of fact, upon the evidence submitted, not merely whether insanity exists, but whether, if it exist, it is of that character which, in law, invalidates the civil act or excuses the alleged crime of its subject. In other words, capacity to do an act is always a question of law; the condition from which such capacity may be deduced is a question of fact.¹

(b.) Contrary Authorities.

§ 152. Although the doctrine stated above is in accordance with the current of English and American authority, it has not been uniformly adhered to. In New Hampshire the court, in an elaborate opinion by Doe, C. J., have laid down

¹ Kempsey v. McGinness, 21 Mich. 123; Gass v. Gass, 3 Humph. 238; Brooke v. Townsend, 7 Gill, 10; Walker v. Walker, 34 Ala. 469; Gardner v. Lamback, 47 Ga. 133; Young v. Stevens, 48 N. H. 133; Boardman v. Woodman, 47 N. H. 120; but see § 153 and cases cited, infra.

a different rule.1 The defendant in this case had been indicted and tried for murder, and alleged in defence that the act, which was admitted, was done under the influence of a phase of insanity called by experts dipsomania, and defined as a morbid and uncontrollable impulse to drunkenness. On exceptions, the Supreme Court held, substantially, that whether there was such a disease as dipsomania, and whether the defendant had that disease at the time of the act charged, and whether the act was the product of the disease, were all questions of fact for the jury; and, further, if the jury should find affirmatively on these questions, that the defendant was entitled to an acquittal. The opinion expressly overruled, on these points, the former case of Boardman v. Woodman,2 in which case Doe, C. J., had dissented from the majority of the court. The law as laid down in State v. Pike would, it seems, make the jury the judges of all questions in the case, both those of fact and those heretofore considered as questions of law.

§ 153. The doctrine of State v. Pike was reaffirmed by the same court in State v. Jones, and was adopted by the Supreme Court of Indiana in Stevens v. The State and Bradley v. The State. In Stevens v. The State it was held that if the alleged homicide were the offspring and product of mental disease, the verdict should be not guilty, and that all the questions involved were matters of fact for the jury. The court expressly approved the doctrine of State v. Pike and of the dissenting opinion in Boardman v. Woodman. The Supreme Court of Maine appear to have recognized the same doctrine as sound in a case in which the issue was upon the sanity of a testator, and the court held that it was for the

¹ State v. Pike, 49 N. H. 399. In this case the history of the law upon the points treated of is reviewed exhaustively, and the reasons which led the New Hampshire court to its final conclusions are stated at great length and with careful elaboration. The length of the opinion in the case renders it impossible to insert in the present work such a synopsis of it as will do justice to the views of the eminent tribunal which pronounced it.

² 47 N. H. 120.

^{* 50} N. H. 369.

^{4 31} Ind. 485.

⁵ Ibid. 492.

jury to say whether or not the testator's belief in spiritual communications and phenomena amounted to an insane delusion and influenced the terms of the will. In so far as the principles laid down in the above decisions contravene the rules of law heretofore stated, they cannot, until they shall have been more generally adopted, be considered as of authority, except in the jurisdictions where such decisions were pronounced.

(c.) Applications of General Rule.

§ 154. The rule that, upon the trial of every question of fact, it is the duty of the court to decide whether sufficient evidence of the alleged fact appears to warrant the submission of the issue to the jury, applies when the issue is upon the sanity of a party.8 And if the question is submitted without some evidence appearing to support the allegation of insanity, the error is ground for reversing a judgment upon a verdict finding the party insane.4 So a court of equity will not order an issue for a jury to be framed for the purpose of determining the mental condition of a party, if the party appear clearly to be sane, or if no facts to prove his insanity be produced before the court. And it is held that no weight whatever can attach to a verdict rendered upon such an issue, when the proof before the Chancellor in the first instance did not warrant him in directing the issue, or, in other words, where the facts made out at the hearing before him

¹ Robinson v. Adams, 62 Maine, 369; and see Ware v. Ware, 8 Maine, 42.

² § 151, ante.

^{*} Cauffman v. Long, 82 Penn. St. 82; Regina v. Law, 2 F. & F. 836, n. Where the evidence tended to show that one who had disappeared had for a considerable time been affected with a severe and dangerous disease of the brain and spine, which his physician thought must have proved fatal in a short time, and would probably have rendered him insane, and there was evidence showing that the disease affected his mind, it was held that the question of insanity should be submitted to the jury as one of fact. John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 41.

⁴ Cauffman v. Long, ubi supra.

were such as to entitle one party or the other to an immediate decree.¹

§ 155. But when the evidence warrants the submission of the question of insanity to the jury, it becomes the exclusive province of the latter to determine the weight of the evidence; and difference of opinion on this point between the court and jury will not authorize the court to set the verdict aside, even though the evidence upon which it is founded appear to be weak and inconclusive.² So it is error for the court to express to the jury any opinion upon the weight of the evidence offered upon the issue of mental capacity, when such evidence is sufficient to warrant the submission of the issue to the jury.³

§ 156. Thus where there was proof of general rationality, and also of a specific delusion, in a testator, it was held to be an encroachment on the rights of the jury for the court to assume that the delusion was habitual, and so charge that the burden of proof was on the party supporting the will, the character of the delusion being matter of fact for the determination of the jury. And the circumstance that the proof of the delusion is all on one side will not authorize the court to direct the jury that it proves the fact. No action of the court should control the exercise of their right to weigh the credibility of evidence. Where a policy of life insurance provided that it should be void if the assured should die by his own hand, and he afterwards committed suicide, it was held that the court should not take from the jury, as insufficient to sustain a recovery, evidence tending to prove him insane when he committed the act of suicide, the weight of the evidence being exclusively for the jury. In a criminal case, an instruction that certain evidence submitted to the jury and tending to prove the defendant's insanity is insufficient to raise a reasonable doubt of his sanity at the time of the commission of the alleged crime, is erroneous, as directly

¹ Atwood v. Smith, 11 Ala. 894...

² Hill v. Nash, 41 Maine, 585; McDaniel v. Crosby, 19 Ark. 538; Kelly v. Miller, 39 Miss. 17; Starrett v. Douglas, 2 Yeates, 46.

Jenkins v. Tobin, 31 Ark. 806.

⁴ Brooke v. Townsend, 7 Gill, 10.

⁵ Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232.

stating that certain evidence is insufficient to prove certain facts.¹ On the other hand, the legal effect of the insanity alleged being a question for the court, an instruction to the effect that, if the jury find that the defendant was insane at the time of the commission of the alleged crime, they should acquit him without regard to the degree of the insanity, is held to be erroneous.²

§ 157. Since it is the province of the court to declare the law, and the jury are to receive it only from the court, it is not allowable to read to the jury decided cases from books, for the purpose of showing that the facts set forth in such cases were not inconsistent with the soundness of mind necessary to the intelligent doing of a certain act.8 For the same reason a witness, upon the trial of an issue of insanity, cannot be allowed to state his opinion as to the mental capacity of the person alleged insane to do the specific act in controversy.4 And this rule extends to physicians and experts testifying as witnesses. Hence it is improper to ask and obtain the opinion even of a physician as to the capacity of any one to make a will, the question of the existence of such capacity being properly addressed to the jury.⁵ And where, upon the issue of the sanity of a testator, a medical witness was asked: "From what you saw, what was his mental capacity?" the question was held to mean capacity to make a will, and to be incompetent, as presenting a question of law and not of medical science.6 Where a medical witness was asked this question: "Assuming that a person had that form of insanity which you denominate melancholia, and had committed suicide, would you attribute that suicide to the disease?" the admission of the question was held erroneous, since it called for no information peculiarly within the knowledge of an expert, but for an inference, which it was within the exclusive province of the jury to draw without being

¹ Guetig v. The State, 63 Ind. 278.

² People v. Best, 39 Cal. 690.

⁸ Dunham's Appeal, 44 Conn. 37. See ch. viii. sec. xiii.

⁴ Arnold's Will, 14 Hun, 325; Farrell v. Brennan, 32 Mo. 328.

⁵ Walker v. Walker, 34 Ala. 469; Carmichael, in re, 35 Ala. 616.

White v. Bailey, 10 Mich. 155.

influenced by the opinion of the witness. And a professional witness will not be permitted to state his opinion as to the condition of a person's mind upon the evidence submitted to the jury in the case, since this would be to permit him to assume the functions of the jury, and decide the very fact at issue.

§ 158. It is held upon the trial of persons charged with felony, where insanity is set up as a defence, that if any competent evidence of insanity appear it is the duty of the court to charge the jury as to the law of insanity as applicable to the case on trial, without any special prayer for such instruc-But the fact that evidence appears which merely tends to prove the existence of mental weakness not amount. ing to insanity, as that the defendant is of a lower order of intellect than other members of his family, will not impose upon the court the duty of instructing the jury as to the law of insanity.4 In accordance with the rule as stated, it is held, as delirium tremens is well settled to be a form of insanity, that if there be evidence, however slight, that the accused person was laboring under this disorder at the time of the commission of the act, the court should charge specifically as to its possible effect.⁵ Upon a general plea of not guilty, an accused person is entitled at common law to have testimony introduced in his behalf to show his insanity at the time the alleged offence was committed.6

- ¹ Van Zandt v. Mut. Ben. Life Ins. Co., 55 N. Y. 169.
- * Negroes v. Townsend, 9 Md. 145. But a medical expert may, on a state of facts hypothetically stated and based on the evidence in the case, give an opinion on the question whether the party is sane or otherwise, as distinguished from the question whether that act in controversy was or was not the outgrowth and result of such insanity. Ibid., and see ch. viii. sec. xi.
 - * Thomas v. The State, 40 Tex. 60.
 - 4 Powell v. The State, 37 Tex. 348.
 - Erwin v. The State, 10 Tex. App. 700. See ch. xiii. sec. iv.
- People v. Olwell, 28 Cal. 456. The rule stated in the text has been modified by statutory provisions in several states.

SECTION II.

PRESUMPTION THAT ALL MEN ARE SANE.

§ 159. It is a presumption of law that all men are sane, and if the insanity of any person be alleged, it is incumbent on the party first alleging it to prove such insanity. These propositions are supported by the general weight of authority.¹ Even in those cases (1) where insanity is alleged as

¹ Shelf. Lun. 50; 1 Coll. Lun. 51; Attorney General v. Parnther, 8 Bro. C. C. 441; Best on Presumptions, 57-70; Greenl. Ev. §§ 42, 373, 689; 3 Starkie Ev. 404, 405; 4 Starkie Ev. 1284, 1244, 1246. See also Jackson v. King, 4 Cow. 207; People v. Robinson, 1 Parker C. Rep. 649; People v. Kirby, 2 Parker C. Rep. 28; Perkins v. Perkins, 39 N. H. 163; Burton v. Scott, 3 Randolph, 399; United States v. McGlue, 1 Curtis C. C. 1; Lilly v. Wagoner, 27 Ill. 395; Myatt v. Walker, 44 Ill. 485; Regina v. Richards, 1 F. & F. 87; Carter v. The State, 12 Tex. 500; and cases cited under the following sections. In Sutton v. Sadler, 3 C. B. n. s. 87, occurs an elaborate discussion of the matter of presumption as applied to cases of insanity, in the course of which Creswell, J., criticises the rule stated in 2 Greenl. Ev. § 689, that "though in the probate of a will, as the real issue is whether there is a valid will or not, the executor is considered as holding the affirmative, and therefore may seem bound affirmatively to prove the sanity of the testator, yet . . . the law itself presumes every man to be of sane mind until the contrary is shown. The burden of proving unsoundness or imbecility of mind in the testator is therefore on the party impeaching the validity of the will for this cause." Creswell, J., says: "If the learned professor by this passage means that the competency of a testator is to be assumed until it is impeached by evidence, we agree with him; but if he means that a will must be assumed to be valid, as made by a competent testator, unless the court or jury who are to decide upon it are convinced that he was incompetent, we think it is not in accordance with the English authorities on the subject. The professor says that the competency of the testator is a presumption of law, not of fact. . . . The presumption of sanity cannot, we think, be treated as a merely artificial or legal presumption, but at the utmost as a presumption of law and fact; that is, an inference to be made by a jury from the absence of evidence to show that a party does not enjoy that soundness which experience shows to be the general condition of the human mind. . . . But that is not a mere presumption of law; and when the whole matter is before the jury, on evidence given on both sides, they ought not to affirm that a document is the will of a competent testator unless they believe that it really is so." The views thus expressed were approved in State v. Pike, 49 N. H.

an excuse for an unlawful act, and (2) where the insanity of a testator is alleged as an objection to the validity of the will, the authorities which hold that the burden of proof to show sanity rests in the one case with the accuser, and in the other with the proponent of the will, do not generally dispute the existence of the presumption of sanity, but hold that in these cases this presumption may be met and controlled by a stronger presumption. This presumption is universal, and These remarks of the learned judge in Sutton v. Sadler would seem to imply a dissent from the authorities cited, not so much in respect of principle as of legal definition. He seems to consider all presumptions of law as indisputable, and all disputable presumptions as "presumptions of fact, or, at most, as mixed presumptions of law and fact." But Greenleaf (1 Ev. §§ 14, 15) divides presumptions of law into two classes, conclusive and disputable, the former of which are not to be overcome by any proof that the fact is otherwise. Disputable presumptions of law, on the other hand, "are the result of the general experience of a connection between certain facts, or things, the one being found to be the companion or effect of the other. The connection, however, in this class is not so intimate, nor so nearly universal, as to render it expedient that it should be absolutely and imperatively presumed to exist in every case, all evidence to the contrary being rejected; but yet it is so general, and so nearly universal, that the law itself, without the aid of a jury, infers the one fact from the existence of the other, in the absence of all opposing evidence. In this mode, the law defines the nature and amount of the evidence which it deems sufficient to establish a prima facie case, and to throw the burden of proof on the other party; and if no opposing evidence is offered, the jury are bound to find in favor of the presumption." 1 Greenl. Ev. § 33. The words commonly used in defining the presumption of sanity, i. e. that "the law presumes every man to be of sane mind until the contrary is shown" (2 Greenl. Ev. § 689), of themselves imply that this is one of the disputable presumptions of law liable to be overcome by evidence. That its weight, like that of all ordinary presumptions when opposed to positive testimony, may probably be very slight, is undisputed, and the opinion in Sutton v. Sadler seems to hold no more than this. It being admitted that the question of sanity is one of fact for the jury (vide § 151, ante), and the weight of authority being in favor of the proposition that the jury may properly consider any intrinsic evidence of insanity contained in the will as bearing upon the question of capacity, it would seem that the remarks of Creswell, J., contained in the last clause of the passage quoted above, merely imply that the jury shall not accept the presumption of sanity as conclusive when opposed by proof, even though such proof be intrinsic to the will.

¹ But in Maine it is held that in cases where the capacity of a testator is at issue there is no presumption of sanity. See sec. iv., post, note.

it is not defeated by common report, or reputation, or the imputations of friends or relatives, or the old age or feebleness of the subject; or, in short, by any cause except controlling evidence produced in the appropriate tribunal.

§ 160. Applying this presumption, it has been held that a court of equity will not direct an issue of insanity to be framed for a jury upon an allegation filed that a person, when he did a certain act, was insane, unless some evidence be at the same time produced in support of the allegation, the presumption being in favor of sanity; and although, upon the trial of an issue of facts, testimony may appear incidentally tending to throw doubt upon the sanity of the party sought to be charged, yet the court will not infer his insanity, unless positive evidence of it be offered as a competent ground of defence in the case. And if a sane person seeks

- ¹ An expression contained in 1 Collinson on Lunacy, 52, would seem to imply that if an unsound state of mind has been imputed to a person by his friends or relations, or even by common fame, he is no longer to be presumed sane; and the writer adds: "If a person has been . . . subject to any restraint, even domestic, permitted by law, in consequence of undisputed lunacy, the burthen of proof is upon "the party alleging his sanity. And the passages in question are adopted without comment in Shelford on Lunacy, 50. These expressions appear to be derived from a dictum of Lord Chancellor Erskine, in his opinion in the case of White v. Wilson, 13 Ves. 87, where like expressions are attributed to Lord Thurlow, in Attorney General v. Parnther, 3 Bro. C. C. 441. But no such expressions appear in the report of the latter case, and they appear to be the result of some confusion as to the distinction between burden of proof and weight of evidence. "Imputations" and "common fame" are generally held incompetent evidence of insanity, and these, as well as the possibly competent fact of restraint, can have no effect to control the presumption of law until produced as evidence before a court authorized to pass on the question of sanity, where the question of their weight will be for the jury. A similar confusion of meaning as between the terms "presumption" and "weight of evidence" occurs in the case of Hodgdon v. Crosby, 1 Wash. Terr. 578, where the question being as to the party's mental capacity to execute a note and mortgage sued on, the judge found, from the party's condition as disclosed by the evidence, that the burden of proof of mental capacity "shifted" to the plaintiff.
 - ² Collins, in re, 3 C. E. Green, 253; § 8, ante.
 - * Long v. Long, 4 Ir. Ch. 106.
- ⁴ Carpenter v. Carpenter, Milward, 159. But this statement is not intended to contravene the rule that in criminal cases proof of the in-

to avoid an act alleged to have been done while his mental faculties were temporarily impaired, the burden is on him to show his incapacity at the time of the act.¹

§ 161. It is not, in general, competent for a court to admit evidence tending to show the sanity of a person, unless some evidence has been introduced previously tending to prove him insane.2 And in a criminal case it is not necessary for the prosecution to summon witnesses before the grand jury to prove the sanity of the accused; and after the prisoner had been fully committed for trial upon the charge of an assault on the President of the United States, with intent to kill and murder him, the court refused to issue a habeas corpus to bring him up for the purpose of examining witnesses to prove his insanity, and for that cause to "discharge him from imprisonment in the common gaol, and to secure the public peace by proper restraint." The writ was refused on the ground that, as every one is presumed to be sane, the allegation of insanity is proper matter of defence or excuse to be reserved for the consideration of the jury.4

SECTION III.

DEGREE OF PROOF REQUIRED TO SUPPORT THE PLEA OF INSANITY
IN CRIMINAL CASES. DIFFERENT RULES.

§ 162. Since the law presumes that all men are sane, the correlative rule obtains that the burden of proof rests on the party alleging insanity.⁵ This rule is, with the exception

sanity of the accused may well arise out of the evidence offered by the accuser.

- ¹ Chicago West Div. Railway Co. v. Mills, 91 Ill. 35.
- ² Dearmond v. Dearmond, 12 Ind. 455.
- * United States v. Lawrence, 4 Cranch C. C. 514.
- 4 lbid. 518.
- Where the question of the mental condition of the victim of a crime has to be considered in order to determine the degree of the crime, the burden of proof to show mental weakness or incapacity is upon the prosecution. Thus, in the case of rape committed upon the person of an idiot or lunatic, the mere proof of sexual connection will not warrant the case being left to the jury. There must be some evidence that it was without

hereafter noted,¹ everywhere admitted; but in cases where the quality of an act prima facie criminal is in issue, and it is alleged in defence that at the time of the commission of such act the doer of it was irresponsible by reason of insanity, a great conflict of authority arises as to what degree of proof on the one side or the other is requisite to decide the issue. Three distinct theories of the application of the law to such cases may be said to obtain.² These may be stated as follows: First. In order to acquit, the proof must show beyond a reasonable doubt³ that the accused was insane. Second. In order to convict, when the plea of insanity is made and supported by evidence, the accuser must show beyond a reasonable doubt that the accused was sane. Third. When insanity

her consent, and that she was incapable, from imbecility, of expressing assent or dissent; and if she consent from mere animal passion, it is not rape. Regina v. Connolly, 26 U. C. Q. B. 317. See Regina v. Ryan, 2 Cox C. C. 115; Regina v. Fletcher, 8 Cox C. C. 131.

- ¹ See sec. iv. (b), post.
- ² Cunningham v. The State, 56 Miss. 272.
- * The term "reasonable doubt" was discussed by Shaw, C. J., in Commonwealth v. Webster, 5 Cush. 295, 320. Considering the rule that the guilt of the accused must be shown beyond a reasonable doubt, he says: "Then, what is a reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible and imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law, independent of evidence, are in favor of innocence; and every person is presumed to be innocent till he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude absolute certainty altogether." See also Meyers v. The Commonwealth, 83 Penn. St. 131.

is alleged and the allegation is supported by testimony, the accused is to be convicted or acquitted according as the fair preponderance of all the evidence in the case shows him to have been sane or insane when the act was committed. These theories will be discussed, here, in their order.

(a.) That, to acquit, Insanity must be proved beyond a Reasonable Doubt.

§ 163. In England, the direct question as to what degree of proof is requisite to justify an acquittal of an accused person upon the ground of insanity does not appear to have been discussed; 1 but it would seem to be a fair inference from expressions contained in the decided cases and text-books that in all cases, to make the defence of insanity available, its existence must be proved to the satisfaction of the jury beyond a reasonable doubt. It is said that "in every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth. . . . The defendant, in this instance, standeth upon the same ground that every other defendant doth; the matters tending to justify, excuse, or alleviate must appear in evidence before he can avail himself of them." 2 On the trial of John Bellingham for the murder of Spencer Percival, had at the Old Bailey in 1812, Sir James Mackintosh, C. J., instructed the jury that in order to support the defence of insanity it ought to be proved by the most distinct and unquestionable evidence, that the prisoner was incapable of judging between right and wrong; that it must, in fact, be proved beyond all doubt, that at the time he committed the . . . act . . . he did not consider that murder was a crime against the laws of God and Nature; and that there was no other proof of insanity which would excuse murder or any other crime.8 And the

¹ See State v. Bartlett, 43 N. H. 224.

^{*} Foster's Crown Law, 255; and see 1 East Crim. Law, 224, 340; Hawk. Pl. ch. 31, § 32; 4 Blackstone Com. 201.

Bellingham's Case, 1 Coll. Lun. 636, 671.

doctrine, as stated by Sir James Mackintosh, was "fully approved" by Lyndhurst, C. B., in 1831. So in another case Rolfe, B., said: "If the prisoner seeks to excuse himself upon the plea of insanity, it is for him to make it clear that he was insane at the time of committing the offence. . . . The onus rests on him, and the jury must be satisfied that he actually was insane. If the matter be left in doubt, it will be their duty to convict him, for every man must be presumed to be responsible for his acts till the contrary be shown." 2

§ 164. Certain expressions of Lord Kenyon contained in Hadfield's Case 8 have been construed as favoring the rule that the question of the existence of insanity alleged as an excuse for crime is to be settled by a fair preponderance of the evidence produced. But upon a fair construction these remarks hardly warrant the inference attempted to be drawn from them. In that case, after the defence had introduced evidence strongly tending to show the insanity of the prisoner, Lord Kenyon said: "Mr. Attorney-General, can you call any witnesses to contradict these facts? With regard to the law as it has been laid down, there can be no doubt upon earth; to be sure, if a man is in a deranged state of mind at the time, he is not criminally answerable for his acts; but the material part of the case is, whether at the very time when the act was committed this man's mind was sane. I confess the facts proved by the witnesses (though some of them stand in near relationship to the prisoner, yet others do not) bring home conviction to one's mind that at the time he committed this offence — and a most horrid one it is — he was in a very deranged state. I do

¹ Rex v. Offord, 5 C. & P. 168.

² Regina v. Stokes, 3 C. & K. 185.

^{*26} St. Tr. 1281. See Note (1), post, following this section. In State v. Bartlett, 43 N. H. 224, the court say, that as some of the Euglish authorities go no further than to hold that it is incumbent on the accused to produce in the first instance some proof to meet the presumption of sanity, it does not follow that it is incumbent on him to raise in the minds of the jury anything more than a reasonable doubt of his sanity. But it would seem, in the absence of contrary authority, that the cases cited in the text sufficiently show that insanity is not, in the English courts, to be considered as "satisfactorily proved," until proved beyond a reasonable doubt. See Cunningham v. The State, 56 Miss. 272.

not know that one can run the case very nicely: if you do run it very nicely, to be sure, it is an acquittal. His sanity must be made out to the satisfaction of a moral man, meeting the case with fortitude of mind, knowing he has an arduous duty to discharge, yet, if the scales hang anything like even, throwing in a certain proportion of mercy to the party." It is to be observed that the above remarks were not addressed to the jury, but were in the form of a suggestion to the Attorney-General, and that the evidence of the defendant's insanity was unrebutted, and so strong as to leave no room for reasonable doubt in an unprejudiced mind. It would, therefore, seem that the expression, even if intended to define a rule as to weight of proof, necessary in the case, was clearly obiter dictum, and that the English rule may fairly be taken to be as stated above.

§ 165. In the United States the rule of the English courts on this subject is supported in New Jersey by the authority of a leading case, in which Hornblower, C. J., after remarking, that, the burden of proof of insanity being on the accused, the jury ought to be satisfied of his insanity beyond a reasonable doubt, said: "The proof of insanity at the time of committing the act ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be in order to find a sane man guilty." In explanation of the rule as stated the Chief Justice added: "I do not mean to say the jury are to consider him sane if there is the least shadow of doubt on the subject, any more than I would say they must acquit a man when there is the least shadow of doubt of his having committed the act. What I

¹ State v. Spencer, 1 Zab. 196 (1846). The same rule was laid down in Alabama, in 1843, in the case of State v. Brinyea, 5 Ala. 241; but that case has since been overruled. Boswell v. The State, 63 Ala. 307. See post, § 176 and note. The same rule has been held at nisi prius in Delaware. State v. Pratt, 1 Houst. Cr. Ca. 250; State v. West, id. 371. But in State v. Thomas, id. 511, it was held that insanity was not to be presumed, but that, if the jury have a reasonable doubt, on the whole evidence, of the capacity of the accused to know his act was wrong, he should be acquitted. In State v. Danby, id. 166, the rule was defined no further than to say that the insanity alleged must be proved to the "satisfaction" of the jury.

mean is, that when the evidence of sanity on the one side, and of insanity on the other, leaves the scale in equal balance, or so nearly poised that the jury have a reasonable doubt of his insanity, there a man is to be considered sane and responsible for what he does. But if the probability of his being insane at the time is, from the evidence in the case, very strong, and there is but a slight doubt of it, then the jury would have a right, and ought, to say that the evidence of his insanity was clear."

(b.) That, to convict, Sanity must be proved beyond a Reasonable Doubt.

§ 166. The doctrine that, in criminal cases, when an issue of fact is joined upon the question of sanity, it becomes necessary, in order to a conviction, that the whole proof should show the sanity of the prisoner beyond a reasonable doubt, found its first expression in the Court of Appeals of New York in 1857.1 It was held, upon a trial for murder where the killing was admitted and the defence alleged was insanity, that, sanity being a necessary condition to constitute the crime, the accused was entitled to the benefit of any doubt arising upon that question, and therefore that the proof of sanity was a part of the case to be made by the prosecution. In Indiana it was clearly held in 1862, on the trial of an indictment for murder, that if the jury, upon all the evidence submitted in the case, were left with a reasonable doubt of the defendant's insanity at the time of the commission of the act, such doubt must include a reasonable doubt whether the act was purposely and maliciously committed, since, without sanity in the doer, his act cannot be criminal.2

§ 167. The same rule appears to obtain in Illinois,8 in

¹ People v. McCann, 16 N. Y. 58.

² Polk v. The State, 19 Ind. 170. This case is followed in Stevens v. The State, 31 Ind. 485; Bradley v. The State, 31 Ind. 492; and Guetig v. The State, 66 Ind. 94.

^{*} Hopps v. The People, 31 Ill. 385 (1863), Walker, J., dissenting. The case overrules Fisher v. The People, 23 Ill. 283, and is explained in Chase v. The People, 40 Ill. 353.

Missisippi, in Georgia, in Kansas, in Nebraska, and in New Hampshire. The reasons relied on in support of it are tersely stated in a case occurring in the latter state,5 the opinion of the court being delivered by Bellows, J., who, after admitting the existence of a conflict of authority upon the point, says: "The conflict which exists has probably arisen in a great degree from an attempt to apply to criminal cases the rules which govern the trial of issues in civil causes. . . . In civil causes the burthen of proof is, in general, upon the party who maintains the affirmative; and when thrown upon the defendant, it is because he sets up by his plea matters which avoid the effect of the plaintiff's allegations, but do not deny them. It is, therefore, right that the burthen of proof should be upon him to establish the truth of such matters in avoidance by a preponderance of evidence, especially as nothing more is required of him than to render the truth of such matters more probable than otherwise. criminal causes the trial is usually had upon a plea that puts in issue all the allegations in the indictment; and, upon every sound principle of pleading and evidence, the burthen is upon the prosecutor to sustain them by satisfactory proofs. system of rules, therefore, by which the burthen is shifted upon the accused of showing any of the substantial allegations in the indictment to be untrue, or, in other words, to prove a negative, is purely artificial and formal, and utterly at war with the humane principle which, in favorem vitæ, requires the guilt of the prisoner to be established beyond a reasonable doubt. Not only so, but, fairly considered, such a system derives no countenance from the rules which govern the trials of civil causes, inasmuch as in respect to all allega-

¹ Cunningham v. The State, 56 Miss. 272.

² Anderson v. The State, 42 Ga. 9; Westmoreland v. The State, 45 Ga. 225.

^{*} State v. Crawford, 11 Kan. 32.

⁴ Smith v. The State, 4 Neb. 277; Wright v. The People, id. 407.

State v. Bartlett, 43 N. H. 224. In this case it is stated that the same rule was adopted in New Hampshire at nisi prius in the cases State v. Corey (1830) and State v. Prescott (1834). These appear to be the earliest cases in which the rule obtained recognition. See also State v. Pike, 49 N. H. 399.

tions in the declaration, provided they are put in issue, the burthen of proof, in general, rests with the plaintiff."

§ 168. The rule thus held is carefully expressed in an opinion of the Court of Appeals of New York, delivered in 1878 by Church, C. J., as follows: "Crimes can only be committed by human beings who are in a condition to be responsible for their acts; and upon this general proposition the prosecutor holds the affirmative, and the burden of proof is upon him. Sanity being the normal and usual condition of mankind, the law presumes that every individual is in that Hence a prosecutor may rest upon that presumption without other proof. The fact is deemed to be proved prima facie. Whoever denies this, or interposes a defence based upon its untruth, must prove it; the burden, not of the general issue of a crime by a competent person, but the burden of overthrowing the presumption of sanity and of showing insanity, is upon the person who alleges it; and if evidence is given tending to establish insanity, then the general question is presented to the court and jury whether the crime, if committed, was committed by a person responsible for his acts, — and upon this question the presumption of sanity and the evidence are all to be considered, and the prosecutor holds the affirmative; and if a reasonable doubt exists as to whether the prisoner is sane or not, he is entitled to the benefit of the doubt and to an acquittal. The question may be stated in a variety of language. There is no rigid rule prescribing the particular terms to be employed, if the substance of the rule is preserved."1

§ 169. It is to be observed that the opinion of Church, C. J., in Brotherton v. The People, guards the rule laid down by the statement that it is not to be applied until the question of sanity is put in issue by the appearance in the case of evidence tending to show the insanity of the accused; in other words, the presumption of sanity is to stand for proof in the first instance. And the same principle has been stated

¹ Brotherton v. The People, 75 N. Y. 159. See also, to the same effect, Moett v. The People, 85 N. Y. 373; Walker v. The People, 26 Hun, 67; People v. Coleman, 13 Reporter, 117; People v. O'Connell, 62 How. Pr. 436.

in Mississippi, as follows: "We think the true rule this. Every man is presumed to be sane, and, in the absence of testimony engendering a reasonable doubt of sanity, no evidence on the subject need be offered; but whenever the question of sanity is raised and put in issue by such facts, proven on either side, as engender such doubt, it devolves upon the state to remove it, and to establish the sanity of the prisoner beyond all reasonable doubt arising out of all the evidence in the case." In Michigan the court say: "The idea that the burden of proof shifts in these cases is unphilosophical and at war with the fundamental principles of criminal law. The presumption of innocence is a shield to the defendant, . . . until the verdict of the jury establishes the fact that beyond a reasonable doubt he not only committed the act, but that he did so with malicious intent. It does not follow, however, that the prosecution at the outset must give direct proof of an actual malicious intent. . . . And on the subject of sanity, that condition being the normal condition of humanity, the prosecution are at liberty to rest on the presumption that the accused was sane until that presumption is overcome by defendant's evidence. The presumption establishes, prima facie, this portion of the case on the part of the government. It stands in the place of the testimony of witnesses, liable to be overcome in the same way. Nevertheless it is a part of the case for the government; the fact which it supports must necessarily be established before any conviction can be had, and when the jury come to consider the whole case, . . . they must do so upon the basis that, on each and every portion of it, they are to be reasonably satisfied, before they are at liberty to find the defendant guilty." 2

¹ Cunningham v. The State, 56 Miss. 272. To the same point see Walter v. People, 32 N. Y. 147; O'Brien v. People, 48 Barb. 274; Guetig v. The State, 66 Ind. 94; Holsenbake v. The State, 45 Ga. 43; Chase v. The People, 40 Ill. 353; Wright v. The People, 4 Neb. 407.

² People v. Garbutt, 17 Mich. 10. In Commonwealth v. Heath, 11 Gray, 303 (1858), a capital case in which idiocy was alleged as a defence, Thomas, J., said: "When a homicide is proved to have been committed in such a way and under such circumstances as when done by a person of sane mind would constitute murder, the presumption of law, as of common sense and general experience, supplies that link. . . . The pre-

(c.) That the Issue is to be determined by the Fair Preponderance of the Evidence.

§ 170. The rule that, when the issue of the insanity of the accused is raised in a criminal case, the question is to be determined by the preponderance of the testimony in the case was briefly laid down by Chief Justice Shaw, in Massachusetts, in 1844. The principle upon which it rests was

sumption stands till it is met and overcome by the evidence in the case. This evidence may come, of course, as well from the witnesses for the government as the witnesses for the defence; and when the evidence is all in, the jury must be satisfied, in order to convict the prisoner, not only of the doing of the acts which constitute murder, but that the acts proceeded from a responsible agent, one capable of committing the offence." The court added: "This is the rule to be applied where the defence is idiocy, an original defect and want of capacity. Whether the rule is modified where the defence relied on is insanity, it is unnecessary now to inquire." Whether or not this remark was intended to throw any doubt upon the expression of the law as to the force of the presumption contained in Commonwealth v. Eddy, post, § 170, the rules laid down in the latter case appear to be accepted in Massachusetts as authority. United States v. McGlue, 1 Curt. C. C. 1, the jury were told that it was incumbent on the accused to satisfy them that he was insane when the blow was struck; but since the law does not presume that insanity arose from any particular cause, that if it were asserted that the accused was guilty, though insane, because his insanity was drunken madness, this allegation must be proved by the prosecutor.

¹ Commonwealth v. Rogers, 1 Met. 500, 506. Shaw, C. J., in his charge in this case, told the jury that "the ordinary presumption is, that a person is of sound mind, until the contrary appears; and, in order to shield one from criminal responsibility, the presumption must be rebutted by proof of the contrary, satisfactory to the jury." The jury, after being in consultation several hours, came into court and asked instructions upon the question whether they must be satisfied beyond a doubt of the insanity of the prisoner to entitle him to an acquittal. In answer to this question the Chief Justice repeated his former remarks on the same point, and added, that if the preponderance of the evidence was in favor of the insanity of the prisoner, the jury would be authorized to find him insane. rule had already been laid down in State v. Marler, 2 Ala. 43 (1841); but in State v. Brinyea, 5 Ala. 241 (1843), it was said that when insanity was relied on as a defence for any act, it must be proved beyond a reasonable The latter case was finally overruled and the doctrine of State v. doubt. Marler reaffirmed in Boswell v. The State, 63 Ala. 307 (1879). In the latter case the subject is very fully discussed and many authorities cited. See post, § 176 and note.

afterwards more fully stated by Metcalf, J., in a capital case occurring in the same state, as follows: "The burden is on the commonwealth to prove all that is necessary to constitute the crime of murder. And as that crime can be committed only by a reasonable being, - a person of sane mind, - the burden is on the commonwealth to prove that the defendant was of sane mind when he committed the act of killing. But it is a presumption of law that all men are of sane mind; and that presumption sustains the burden of proof, until it is rebutted and overcome by satisfactory evidence to the contrary. In order to overcome this presumption of law, and shield the defendant from legal responsibility, the burden is on him to prove, to the satisfaction of the jury, by a preponderance of the whole evidence in the case, that, at the time of committing the homicide, he was not of sane mind." The same rule, as applied in favor of the accused, is thus expressed in Ohio.2 "The burden of establishing the insanity of the accused affirmatively to the satisfaction of the jury . . . rests upon the defence. It is not necessary, however, that this defence be established beyond a reasonable doubt: it is sufficient if the jury is reasonably satisfied by the weight or preponderance of the evidence that the accused was insane at the time of the commission of the act." 8

§ 171. The same rule appears to have been accepted in Minnesota. The defence in a capital case having asked the court below to rule that if a "reasonable doubt" of the defendant's sanity appeared, he was entitled to an acquittal; and having cited in support of the request the case of People v. McCann,4 the court refused to accept the authority of that case, and sustained the refusal of the court below to give the instruction asked for on the ground that "the plea of insanity

¹ Commonwealth v. Eddy, 7 Gray, 583 (1856).

² Loeffner v. The State, 10 Ohio St. 598 (1857). See also, to the same effect, Bond v. The State, 23 Ohio St. 349.

The court, in Loeffner v. The State, added: "The defence of insanity... does not change the nature of the issue so as to give the affirmative to the defendant and entitle the defendant to the opening and closing argument to the jury."

^{4 16} N. Y. 58. See § 166, ante.

is one for the defendant to establish." So in North Carolina it has been held that even if it appear that the accused was insane at a time previous to the act, yet his insanity at the time of the act is an open question of fact, to be established to the satisfaction of the jury; and if it be not so established, then on the strength of the legal implication of malice the accused is to be held guilty.²

- § 172. The rule as laid down in Massachusetts is adopted in California and in Missouri. In the latter state the court say: "Other courts have held that all that is necessary is to produce enough evidence to create a reasonable doubt in the minds of the jurors as to whether insanity exists in the given case or not; while it has been repeatedly held in this court that insanity is a simple question of fact, to be proved like any other fact, and any evidence which reasonably satisfies the jury that the accused was insane at the time the act was committed should be deemed sufficient." The courts of Virginia adopt the same rule, and add, that if, upon the whole evidence in the case, the jury believe that the accused was insane when he committed the act, they should acquit, "but not on any fanciful ground, that, though they believe
 - ¹ Bonfanti v. The State, 2 Minn. 123 (1858).
- ² State v. Starling, 6 Jones, 366 (1859); State v. Vann, 82 N. C. 63. But see obiter dicta occurring in State v. Payne, 86 N. C. 609 (1882), to the effect that although the plea of insanity must, in a criminal case, be established to the satisfaction of the jury, yet it is error to charge that the burden is upon the accused to prove insanity by a preponderance of the evidence.
- * People v. Myers, 20 Cal. 518 (1862); People v. Coffman, 24 Cal. 230; People v. McDonnell, 47 Cal. 134; People v. Wilson, 49 Cal. 13; People v. Messersmith, 57 Cal. 575; People v. Hamilton, 14 Reporter, 46. The latter case holds that the proof must be such in amount that if the issue of sanity or insanity were submitted to the jury in a civil case it would determine the issue.
- 4 State v. McCoy, 34 Mo. 53 (1864); State v. Klinger, 43 Mo. 127 (expressly dissenting from the rules laid down in People v. McCann, 16 N. Y. 58, see § 166, ante); State v. Hundley, 46 Mo. 414; State v. Smith, 53 Mo. 267; State v. Redemeier, 8 Mo. App. 1; State v. Erb, 74 Mo. 199.
- ⁵ State v. Smith, ubi supra. The same rule seems to have been applied, in effect, in State v. Huting, 21 Mo. 464 (1855); but in the latter case the principles upon which the rule rests are not precisely stated.

he was sane, yet, as there may be a rational doubt of his sanity, he is entitled to an acquittal." And in Idaho the rule has been applied in favor of the accuser in a capital case,² and it seems to be adopted in Washington Territory.³

- § 173. In Kentucky, an instruction given in the court below, "that if the jury have a reasonable doubt as to the sanity of the accused at the time of the alleged killing, they must acquit him," was pronounced erroneous, the court holding that a mere doubt, however rational, is wholly insufficient to rebut the legal presumption of sanity, and does not enter as an element into that rational doubt which should result in acquittal; but, on the other hand, if the preponderating evidence convinces the jury that the perpetrator was in such a mentally diseased condition as to destroy his free agency, they should not convict merely because they might entertain a rational doubt of his insanity.4 And the general rule that insanity, when alleged as a defence in a criminal case, must be proved by a preponderance of evidence, is adopted in Maine,⁵ Arkansas,⁶ Iowa,⁷ Texas,⁸ and, it seems, in Connecticut.9
- § 174. In Pennsylvania it is said: "The law of the state is, that where the killing is admitted, and insanity or want of legal responsibility is alleged as an excuse, it is the duty of the defendant to satisfy the jury that insanity actually existed at the time of the act, and a doubt as to such insanity will not
- ¹ Boswell v. The Commonwealth, 2 Gratt. 860 (1870). To the same effect see Baccigalupo v. Commonwealth, 33 Gratt. 807; Dejarnette v. The Commonwealth, 75 Va. 867.
 - ² People v. Walter, 1 Idaho, 386 (1871).
 - McAllister v. Territory of Washington, 1 Wash. Terr. 361 (1872).
- ⁴ Kriel v. Commonwealth, 5 Bush, 362 (1869). And see Graham v. Commonwealth, 16 B. Mon. 587.
 - State v. Lawrence, 57 Maine, 574 (1870).
 - McKenzie v. The State, 26 Ark. 334 (1870).
- ⁷ State v. Felter, 32 Iowa, 49 (1871); and see State v. Geddis, 42 Iowa, 264.
- * Webb v. The State, 5 Tex. App. 596 (1879); Same v. Same, 9 Tex. App. 490; King v. The State, id. 515; Johnson v. The State, 10 Tex. App. 571.
 - State v. Hoyt, 46 Conn. 830 (1878); Same v. Same, 47 Conn. 578.

justify a jury in acquitting on that ground." On the other hand, it is said to be error to instruct the jury that they must be satisfied beyond a reasonable doubt that the prisoner was insane, the court observing: "This instruction was too stringent, and threw the prisoner upon a degree of proof beyond the legal measure of his defence, which measure is simply proof that is satisfactory; such as flows fairly from a preponderance of the evidence. A reasonable doubt of the fact of insanity, on the other hand, is not sufficient to acquit. . . . But the evidence of this need be only satisfactory, and the conclusion such as fairly results from the evidence. . . . There may be a doubt still existing in the mind, yet the actual weight may be with the prisoner, and this proof should be satisfactory." 2

- § 175. In Michigan the rule as to the measure of proof of insanity necessary in criminal cases does not appear to be definitely settled, but the court seems inclined to the view that it is sufficient, in order to an acquittal, that insanity be proved to exist by a fair preponderance of the testimony, it being said, in a leading case occurring in that state, that insanity alleged as a defence for an act is "to be established with the like clearness" as the act itself, "or, at least, by a preponderance of the testimony." And the court in the same case criticises the doctrine held in State v. Spencer, and said to be held in certain English cases, that insanity must be proved beyond a reasonable doubt in order to an acquittal.
- § 176. As before stated,⁵ the rule that insanity, as a defence in a criminal case, is to be established, if at all, by a fair preponderance of testimony, was clearly and concisely laid down by the court in Alabama in 1841.⁶ But later it was held in
- ¹ Lynch v. The Commonwealth, 77 Penn. St. 205 (1874). The doctrine of this case was followed the same year, in an elaborate opinion, in Ortwein v. The Commonwealth, 76 Penn. St. 414.
- ² Meyers v. The Commonwealth, 83 Penn. St. 131. See also Pannell v. The Commonwealth, 86 Penn. St. 260, and Sayres v. The Commonwealth, 88 Penn. St. 260. In Pennsylvania the statute provides that insanity, when made a ground of acquittal in a criminal case, shall be found by a special verdict. Crim. Code of 1860, § 66.
 - People v. Garbutt, 17 Mich. 9.
 - 4 1 Zab. 196, cited ante, § 165.
 - ⁵ Ante, § 170, note.
 - ⁶ State v. Marler, 2 Ala. 43. In this case the rule since adopted in

the same state that when the act was incontestably proved the defence of insanity must be made out beyond a reasonable doubt.¹ Still later, in an elaborate opinion² the court, after commenting on the cases of State v. Marler and State v. Brinyea, said: "We feel at liberty to affirm that the question of measure of proof on the defence of insanity is not settled in this court," and adopted the rule of the Supreme Court of Massachusetts as laid down in Commonwealth v. Eddy.³

Note. — (1.) There appear in the reports a number of cases touching the matter of proof when insanity is made an issue in criminal cases which do not clearly define the measure of proof necessary to the decision of the question. In the answers to the questions propounded to the judges by the House of Lords and suggested by the proceedings in the trial of M'Naghten, 10 Cl. & Fin. 200, Tindal, C. J., said: "The jurors ought to be told that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved, that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, he did not know he was doing what was wrong." And in Regina v. Higginson, 1 C. & K. 129, the court said that if the jury were "satisfied that the prisoner committed this offence," but were also "satisfied that the prisoner was so insane"

so many states seems to have been first definitely expressed, and with great precision. The court held that the jury were not bound to acquit, "if they entertained a reasonable doubt as to the prisoner's sanity." Insanity is "to be made out by proof as full and satisfactory as is required to establish the existence of any other fact. A reasonable doubt whether the accused was sane would not authorize his acquittal, — there must be a preponderance of proof to show insanity to warrant a verdict of not guilty for that cause." Nor should the jury be instructed "that if they entertain a reasonable doubt as to the prisoner's insanity it would be their duty to regard him as sane. . . . It was entirely possible for the jury to have entertained a reasonable doubt of his insanity, although the weight of evidence was so strong as to have led their minds to the conclusion that such was the prisoner's condition." Such "charge . . . must have induced the jury to believe that the proof of insanity should have been conclusive and irresistible." Collier, C. J.

- ¹ State v. Brinyea, 5 Ala. 241 (1843).
- ² Boswell v. The State, 63 Ala. 307 (1879).
- 7 Gray, 583. See ante, § 170.

as to be irresponsible, they should acquit. These cases have been cited as accepting the rule that the question of insanity is to be decided by a fair preponderance of the evidence in conflict with the rule, stated to be held in England (ante, § 164), that insanity, in order to acquit, must be shown beyond a reasonable doubt. But it would seem that the statement that the fact must be proved to the "satisfaction" of the jury cannot have been intended to exclude an instruction that such satisfaction must be "beyond all doubt." (See cases cited ante, §§ 163, 164.) In Regina v. Higginson, which was a trial at nisi prius, it is to be observed that the court used the same terms in defining the proof of the act itself and of the insanity alleged to excuse it. The court cannot have intended to instruct the jury that a mere preponderance of the evidence would justify them in finding the accused guilty of the act charged; but the opinion is open to that construction if the latter clause of the extract above is to be accepted as embodying the meaning claimed for it.

So, on the other hand, the case of State v. Stark, 1 Strob. (S. C.) 479, which holds that the alleged insanity must be "proved to the satisfaction of the jury," has been criticised (see People v. Garbutt, 7 Mich. 9), as apparently approving the rule that the defence of insanity must, in order to acquit, be proved beyond a reasonable doubt. See § 163, ante.

Note. — (2.) It is a general rule, upon a party being convicted of crime, notwithstanding the plea of insanity in the defence, and no palliating circumstances appearing except those offered in proof of insanity, that the circumstances so offered, if proved, cannot avail to reduce the degree of the crime. Baldwin v. The State, 12 Mo. 223. As to certain modifications of this rule in cases of crimes committed by intoxicated persons, see ch. xiii. sect. iv., (c).

SECTION IV.

SANITY PRESUMED IN THE PROOF OF WILLS.

§ 177. In cases where the question of a testator's sanity at the time of the execution of an alleged will is put in issue, either upon the offer of the will for probate or upon the trial of an issue of devisavit vel non framed for a jury, it may be stated as a rule, supported by reason and the weight of authority, that the law presumes the testator's sanity until the contrary is proved, and that, the formal execution of the will being proved, the presumption of sanity stands for proof of capacity until it is controlled by the weight of the evidence produced to meet it. Upon this subject Cooley, J.,

says: "The party assuming the burden of establishing a will has not supposed himself bound in his opening to go further than to give evidence by the subscribing witnesses of those facts which would make out, prima facie, a valid testamentary instrument, and has left all further evidence on the subject of mental capacity to be brought in by way of answer to that adduced by the contestant. The evidence at the opening has usually been of a formal character, and the proponent has confined himself to inquiries of a general nature respecting the signing and attestation, and whether at the time the party appeared to understand the business in which he was engaged. . . . To prove that the decedent was not insane is to prove that an exceptional state of facts did not exist; in other words, it is to prove a negative, and on general principles very slight evidence only should be demanded of the party called upon to take the burden of proving such a state of facts." 1

¹ Taff v. Hosmer, 14 Mich. 809. The rule stated, although supported by the great weight of authority, has not been uniformly accepted. Thus in Maine it is said that where a will is to be proved the law does not presume that the testator was sane at the time of executing the will as in the case of the making of other instruments, but that his sanity is to be proved, in the first instance, by affirmative testimony. Gerrish v. Nason, 22 Maine, 438; Cilley v. Cilley, 34 Maine, 162; Robinson v. Adams, 62 Maine, 369; Barnes v. Barnes, 66 Maine, 286. In Crowninshield v. Crowninshield, 2 Gray, 524, the Supreme Judicial Court of Massachusetts, in an opinion by Thomas, J., inclined to the view that, under the statutes of that commonwealth (providing that "every person of full age and sound mind may by his last will in writing . . . dispose of his estate." Pub. Sts. Mass. c. 127, § 1), there is no presumption in favor of the sanity of a testator. But in Baxter v. Abbott, 7 Gray, 71, a majority of the same court approved an instruction to the jury "that the legal presumption, in the absence of evidence to the contrary, was in favor of the sanity of the testator;" Thomas, J., dissenting, and adhering to the view intimated in Crowninshield v. Crowninshield. In Beasley v. Denson, 40 Texas, 416, it was held that the presumption of sanity did not obtain in the probate of a will when the course of descent was changed by the will, but that affirmative proof of the testator's sanity was essential. In Higgins v. Carlton, 28 Md. 115, Brent, J., said: "In some of the states it is held that this general presumption [of sanity] does not apply to last wills and testaments, — they forming an exception to the rule, — and that, therefore, a party propounding a will must not only prove execution, but must also

. § 178. Moreover, the existence in many jurisdictions of a long-settled practice to examine the subscribing witnesses to a will as to the sanity of the testator would not seem to change the rule as stated, since, when the attesting witnesses are dead or absent, "there can, of course, be no examination as to the sanity of the testator, and it is nowhere laid down that the party is under any obligation to produce any other evidence upon that point except the testimony of the attesting witnesses;" and when the witnesses cannot be produced, the proponent "may safely rely upon the presumption of the law that all men are sane until some evidence is offered to the contrary." And although it is said that the practice of interrogating the attesting witnesses as to the testator's sanity has so long obtained that this may be considered as essential for the probate of a will,2 yet it is held that, there being no circumstances of suspicion attending its execution, such interrogation is unnecessary.8

offer positive proof of capacity. . . . A different rule, however, is recognized in most of the American courts, and it is sustained by reason and the weight of authority." The court further said: "The case of Cramer v. Crumbaugh, 3 Md. 501, cannot be taken to . . . alter this principle. It is true it is said in that case, on the authority of Baron Parke, 1 Curteis, 637 (6 Eng. Eccl. Rep. 417), that the party propounding a will has the onus imposed upon him, and he must discharge it 'by proof of capacity and the fact of execution.' But the quo modo of proof must be in harmony with other recognized rules and principles. If capacity be established by proof of an act from which it is to be presumed, 'proof of capacity' has in reality been given; and the onus cast upon a party propounding a will is discharged by proof of execution, because that being proved, the presumption of capacity follows." In Turner v. Turner, 1 Littell (Ky.), 101, it was said that there is less presumption of sanity at the time when a will was executed where testator is shown to have been previously afflicted with the mental debility attending old age than there is where the mental malady is ordinary lunacy. But this expression would seem to mean no more than that, when the presumption is confronted with opposing proof in the case, its effect is correspondingly weakened.

- ¹ Perkins v. Perkins, 39 N. H. 163. In this case the question is exhaustively discussed. See also the opinion of Parker, C. J., in Pettes v. Bingham, 10·N. H. 514; Hawkins v. Grimes, 13 B. Mon. 257.
 - ² Perkins v. Perkins, ubi supra.
 - * Bartee v. Thompson, 8 Baxt. 508.

§ 179. The weight of authority appears to favor the rule that, in those states where the statute expressly requires affirmative proof of the testator's sanity in order to the probate of his will, this requirement cannot do away with the legal presumption of sanity which still exists in every case, however much the effect of such presumption, as standing for proof, may be weakened in the particular case by the evidence pro-Thus in Kentucky it is held that the legal presumption is in favor of the sanity of the testator, though the statute may require some proof of sanity; and if the evidence render the question of sanity doubtful, the legal presumption should have its effect. And the same rule was adopted, after careful consideration, in Massachusetts.² So in Illinois, where, also, the statute requires affirmative proof of the testator's sanity by the subscribing witnesses, it is said that the burden of proof is first on the proponent; but, this being satisfied, the burden is on the contestant, not only to neutralize the affirmative proof, but also the presumption, of sanity.4 But in Michigan the rule appears to be more narrowly applied, the court in that state holding that "it is not error to decline to charge that if the jury should find that, upon the other testimony as to the testator's soundness, the evidence was balanced, they should allow the legal presumption of sanity to decide the question in the testator's favor. The burden is on the proponents to establish capacity by other evidence than the presumption of sanity, and that presumption cannot have the force of an independent fact to serve as a substantial make-weight against counter-proof. Perhaps it would be going too far to say that the statute in requiring substantive proof . . . intended to put aside altogether, and for all cases, the common-law presumption in favor of sanity, . . . yet it can never have much influence when the issue upon the testator's sanity is contested in the usual way. . . . And whatever force may be due to it in given instances will be owing, not to its intrinsic weight as a distinct item of proof, but to

¹ Hawkins v. Grimes, 13 B. Mon. 257.

² Brooks v. Barrett, 7 Pick. 94.

^{*} Trish v. Newell, 62 Ill. 196.

⁴ Carpenter v. Calvert, 83 Ill. 62.

its operation in some degree, more or less, in rendering the circumstances adduced to prove sanity more persuasive." 1

(a.) Upon Formal Proof, Burden shifts to Contestant.

§ 180. It being a rule of law that, as against the heir, the burden to prove all the incidents necessary to the execution of a valid will, including testamentary capacity, is upon the party alleging such execution, and it being also admitted, as stated, that the presumption of sanity exists in cases where the question of testamentary capacity is at issue, and, further, that this presumption stands, until controlled, in the place of proof, the question has arisen whether or not, at this point of the case, the burden of proof shifts to the party who denies the existence of capacity. Respectable authorities appear in support of the negative view of this question; but it may be said that not only is the authority of most of the text-writers in favor of the proposition that, formal proof of the will having been given, the burden of proof is thenceforward upon the contestant to show the incapacity,2 but that the weight of the reported authorities appears to be in favor of the same rule.8 In a leading case in New York the court held that while one "propounding an alleged testamentary paper must prove, not only the execution and publication of the instrument, but also the mental capacity of the testator, so that if, on consideration of the evidence on both sides, the court is not

¹ McGinness v. Kempsey, 27 Mich. 363.

² See 1 Coll. Lun. 54 et seq.; Shelf. Lun. 274; Rogers, Ecc. Law, 900; 1 Jarman, Wills, 74; 1 Wms. Exrs. 18; 2 Greenl. Ev. § 689; Swinburne, Wills, 44, pt. 2, § 3; 1 Redf. Wills, ch. iii. sec. iv., 5; Lovelass on Wills, 15, 142; Bac. Abr. F. title Idiots; 6 Cruise, Dig. 14; 1 Peake's Ev. 373; Powell, Dev. 46.

⁸ Several cases are cited as adopting the contrary view, which, on examination, appear to go no further than to hold the admitted rule that the burden is, in the first instance, on the proponent to show the testator's capacity. See Wallis v. Hodgeson, 2 Atk. 55, and the obiter dicta of Sir Joseph Jekyll in Harris v. Ingledew, 3 P. Wms. 91, and also Comstock v. Hadlyme, 8 Conn. 254, and Potts v. House, 6 Ga. 324. In the two latter cases the question raised was, which party, as having the affirmative, should go forward at the trial, and the court decided that this should be the executor.

satisfied that the proposed testator was of sound and disposing mind and memory, probate must be denied," yet, "at common law and under our statutes, the legal presumption is that every man is compos mentis, and the burden of proof that he is not so rests on the party who alleges that an unnatural condition of mind existed in the testator. He who sets up the fact that the testator was non compos mentis must prove it." 1

- § 181. This subject has been discussed elaborately in Maryland, and the court there, while admitting that "the party propounding the will has the onus imposed upon him, and must discharge it by proof of capacity and the fact of execution," say: "But the quo modo of proof must be in harmony with other recognized rules and principles. If capacity be established by proof of an act from which it is to be presumed, proof of capacity has in reality been given, and the onus cast upon a party propounding a will is discharged, because, that being proved, the presumption of capacity follows." And the court therefore held that in such a case the burden of proof rested on the person alleging incapacity.² The same view was adopted in 1815 in the Circuit Court of the United States,⁸
- ¹ Delafield v. Parish, 25 N. Y. 9. See also Jackson v. Van Deusen, 5 Johns. 144, where the early authorities are collected; Allen v. Public Administrator, 1 Bradf. Surr. 378; Brown v. Torrey, 24 Barb. 583; Kingsley v. Blanchard, 66 Barb. 317; Miller v. White, 5 Redf. 320. In Van Pelt v. Van Pelt, 30 Barb. 134, the court held that where the testator is unable to read or write, is extremely ignorant, is weak in understanding, and is susceptible to influence, or the victim of passion or prejudice, a simple compliance with the statutory forms of execution will not be sufficient to render the will valid, but that the burden of proof is shifted in such a case, so that the party propounding the will is bound to show, not only that the formal acts required by the statutes in all cases were performed, but the testator knew what he was executing and was cognizant of the provisions of the testament. See also Weir v. Fitzgerald, 2 Bradf. Surr. 42, 69; Mowry v. Silber, id. 133. It would seem that in the above cases the court is to be understood as holding merely that, when the presumption of sanity is met by evidence of insanity, it becomes incumbent on the proponent, in order to overcome the weight of evidence against him, to produce affirmative evidence of sanity.
- ² Higgins v. Carlton, 28 Md. 115, followed in Tyson v. Tyson, 87 Md. 567, and Taylor v. Creswell, 45 Md. 422. See also Cramer v. Crumbaugh, 3 Md. 491, as explained in Higgins v. Carlton, ubi supra.
 - * Hoge v. Fisher, 1 Pet. C. C. 163.

and, later, it was followed in a leading case occurring in the same court for the district of New Jersey; 1 and it is accepted by the courts of law and equity of the latter state.2

§ 182. In an early case in Pennsylvania the court said: "The presumption of law appears to be in support of the sanity of the testator, and it is a hard and difficult point to prove his want of understanding." 8 And, in a line of later cases, it is held clearly in the same state that, after formal proof, the burden is upon the party alleging incapacity.4 The same opinion appears to obtain in Kentucky.⁵ In Tennessee it is held that although the burden is upon the proponent to prove the will, yet the burden of proving the testator's insanity, if alleged, is upon the contestant,6 so that, its formal execution being once proved, the will may be read to the jury without requiring formal proof of the testator's sanity on the part of the proponent. Similar principles are adopted by the courts in Delaware,8 Alabama,9 Mississippi,10 Wisconsin, 11 Iowa, 12 North Carolina, 18 South Carolina, 14 Arkansas, 15 Kansas, 16 and Illinois. 17

- ¹ Stevens v. Vancleve, 4 Wash. C. C. 262.
- ² Sloan v. Maxwell, 2 Green Ch. 563; Whitenack v. Stryker, 1 Green Ch. 9; Den v. Gibbons, 2 Zab. 117; Turner v. Cheesman, 2 McCart. 243.
 - * Heister v. Lynch, 1 Yeates, 108 (1792).
- ⁴ Landis v. Landis, 1 Grant Cas. 248; Werstler v. Custer, 46 Penn. St. 502; Thompson v. Kyner, 65 Penn. St. 368; Egbert v. Egbert, 78 Penn. St. 326.
 - ⁵ Turner v. Turner, 1 Littell, 101; Hawkins v. Grimes, 13 B. Mon. 257.
- ⁶ Bartee v. Thompson, 8 Baxt. 508; Cox v. Cox, 4 Sneed, 87; Puryear v. Reese, 6 Cold. 21.
- ⁷ Gass v. Gass, 3 Humph. 278; Ford v. Ford, 7 Humph. 92; Frear v. Williams, 7 Baxt. 550.
- ⁸ Masten v. Anderson, 2 Harr. 381; Cordrey v. Cordrey, 1 Houst. 269; Lodge v. Lodge, 2 Houst. 418; Jamison v. Jamison, 3 Houst. 108.
- Dunlap v. Robinson, 28 Ala. 100; Saxon v. Whitaker, 30 Ala. 237; Copeland v. Copeland, 32 Ala. 512; Stubbs v. Houston, 33 Ala. 555.
 - 10 Payne v. Banks, 32 Miss. 392.
 - ¹¹ Cole's Will, 49 Wis. 179.
 - ¹² Coffman's Will, 12 Iowa, 491.
 - ¹⁸ Mayo v. Jones, 78 N. C. 402.
 - 14 Kinloch v. Palmer, 1 Const. 216.
 - 15 McDaniel v. Crosby, 19 Ark. 533; Jenkins v. Tobin, 31 Ark. 306.
 - ¹⁶ Rich v. Bowker, 25 Kan. 7. ¹⁷ Yoe v. McCord, 74 Ill. 33.

- § 183. In New Hampshire it was said by Parker, C. J., in a leading case, that, every person being supposed to be of sound mind till the contrary appears, the burden of proof to show incapacity was with the contestant of a will.¹ But in a later case the court in that state seem to consider it as a doubtful question whether the burden of proof shifts, in a technical sense, to the opposing party, upon formal proof of the execution of the will being given.²
- § 184. In England the ecclesiastical courts hold that the burden of proof to show testamentary capacity is in the first instance upon the proponent; 8 but they recognize at the same time the existence and effect of the presumption of sanity. Sir John Nichol says: "The principle of law admits of no controversy. Every person is presumed to be sane until it is shown that he has become insane; the presumption then changes: it is presumed that he continues of unsound mind." 4 He adds, that the idea that a different rule prevails in the courts of common law is erroneous; 5 and, giving effect to the presumption, says, in a later case: "In a case of a perfectly sound mind and free from any suspicion of imposition, . . . evidence of bare execution would be sufficient; the law would imply the rest. . . . Neither fraud nor the absence of sound mind is to be presumed." 6 Later, in a case where testimony appeared tending to prove the insanity of the testator at the time the will was executed, Sir Herbert Jenner said: "It is admitted that in this case, as in others, the presumption of law is in favor of sanity, . . . and that it is incumbent on the party alleging the insanity to establish that state of mind." In a leading case Baron Parke said:

¹ Pettes v. Bingham, 10 N. H. 514.

² Perkins v. Perkins, 39 N. H. 163.

^{*} Dew v. Clark, 3 Add. Ecc. 79; Smee v. Smee, L. R. 5 P. D. 84.

⁴ Groom v. Thomas, 2 Hagg. Ecc. 433. See also Symes v. Green, 1 Sw. & Tr. 401.

⁵ Citing Attorney General v. Parnther, 3 Bro. C. C. 341. See also White v. Wilson, 13 Ves. 87.

⁶ Wheeler v. Alderson, 3 Hagg. Ecc. 574.

⁷ Chambers v. The Queen's Proctor, 2 Curt. 415. In this case the will was supported, although executed by one who had been the subject of insane delusions on the three days previous to its execution, and who

"In all cases the onus is imposed on the party propounding a will; it is in general discharged by proof of capacity and the fact of execution, from which the [testator's] knowledge of and assent to the contents of the instrument are assumed." And, later, Lord Brougham observed: "No doubt, he who propounds a later will undertakes to satisfy the Court of Probate that the testator made it, and was of sound and disposing mind. But very slight proof of this, where the factum is regular, will suffice; and they who impeach the instrument must produce their proofs, should the party actor (the party propounding) choose to rest satisfied with his prima facie case, after an issue tendered against him. In this event the proof has shifted to the impugner." 2

§ 185. The general subject of presumption and proof in cases where the issue of testamentary capacity is presented was very elaborately discussed in the Court of Common Bench in 1857. The opinion in the case, by Creswell, J., while seeming to hold that the presumption of sanity " is not a presumption of law, but a presumption of fact, or the most a mixed presumption of law and fact," does not, in respect of the matter of burden of proof, lay down a different doctrine from that of the English and American cases already referred The case holds that, while he who relies upon a will in opposition to the title of the heir-at-law must prove it to be the will of a person of sound and disposing mind, yet, such proof having been given, if incompetency of the testator is alleged it is incumbent upon the party alleging such incompetency to prove it. The court say: "If, indeed, a will, not irrational on the face of it, is produced before a jury, and the execution of it proved, and no other evidence is offered, the jury would properly be told that they ought to find for the

destroyed himself on the following day, while temporarily insane. See also White v. Driver, 1 Phill. 84; Cartwright v. Cartwright, id. 90.

¹ Barry v. Butlin, 2 Moo. P. C. 480

² Waring v. Waring, 6 Moo. P. C. 341. In this case Lord Brougham, speaking of the general subject of burden of proof, further said: "The burden of proof often shifts about in the process of the cause, accordingly as the successive steps of the inquiry, by leading to inferences decisive, until rebutted, casts on one or the other party the necessity of protecting himself from the consequences of such inferences."

will; and if the party opposing the will gives some evidence of incompetency, the jury may, nevertheless, if it does not disturb their belief in the competency of the testator, find in favor of the will; and, in each case, the presumption in favor of competency would prevail." 1

(b.) Consideration of Contrary Authorities.

§ 186. It remains to consider the authorities which hold `upon the question of testamentary capacity, that, as the burden of proof is, in the first instance, upon the party supporting the will, so it remains to the end of the case. In Maine and Texas, as has been already stated,2 the courts hold that, on the question whether a will shall be established, there is no presumption of the testator's sanity. As a result of this doctrine, it is held in the former state that the burden of proof to show sanity is upon the proponent throughout. In Massachusetts, where the doctrine is finally settled that the presumption of sanity exists when the issue is upon the sanity of a testator,8 the matter of burden of proof in such cases has been elaborately discussed. In the earliest reported case on the subject occurring in that state, the question being which party should go forward at the trial, the court held that the burden of proof was with the party affirming sanity, and that he must produce satisfactory evidence of the testator's capacity.4 But this doctrine was criticised in a later case, where it was held that the will being proved, prima facie, by the statute evidence, the burden of proof was on the party objecting to its allowance on the ground of insanity to show the testator's incompetence, and that, when the evidence was doubtful, the presumption of sanity should have its effect. And the court, by Wilde, J., said: "The burden of proof shifts from the executor to the heir." 5 Still later, it was held

¹ Sutton v. Sadler, 3 C. B. N. s. 87. See discussion of this case, § 159, note, ante.

² See note to § 177, ante, and cases cited.

Baxter v. Abbott, 7 Gray, 71; and see note to § 177, ante.

⁴ Phelps v. Hartwell, 1 Mass. 71.

⁵ Brooks v. Barrett, 7 Pick. 94.

that the burden of proving the sanity of the testator was upon the proponent of the will, and did not shift upon evidence of his sanity being given by the subscribing witnesses. The cases cited above were discussed, and the doctrine of Phelps v. Hartwell approved and that of Brooks v. Barrett criticised. The court, by Thomas, J., said: "We can perceive no shifting of the burden of proof; the issue throughout is but one: Was the testator of sound mind? And the affirmative of this was upon the party offering the will for probate. Again that issue is of fact, and to the jury. How is the court to determine when the will is 'proved' or 'sufficiently proved 'by the attesting witnesses, 'so that the burden of proof shifts from the executor to the heir'? It is a question of the effect of evidence. . . . The issue after the evidence is all in is precisely the same that it was at the beginning: Was the testator of sound mind?—an issue in its very nature incapable of division." And still later, in Baxter v. Abbott² (in which case the general doctrine as to the existence of the presumption of sanity was affirmed contrary to an intimation of opinion contained in Crowninshield v. Crowninshield), it was said that the existence of the presumption "does not change the burden of proof; . . . this always rests upon those seeking the probate of the will." 8 In Michigan, where the

- ¹ Crowninshield v. Crowninshield, 2 Gray, 524.
- ² Baxter v. Abbott, 7 Gray, 71.
- * The doctrine of the Massachusetts cases seems to rest upon the assumption that the burden of proof in any case can never, in a technical sense, shift from the party on whom it rests at the outset to the opposite party. And the same view seems to prevail in Michigan. See People v. Garbutt, 17 Mich. 10, as cited ante, § 175. But the English courts appear to hold a different view of the law on this subject. Baron Parke says: "The strict meaning of the term onus probandi is this, that if no evidence is given by the party on whom the burthen is cast the issue must be found against him." Barry v. Butlin, 2 Moo. P. C. 480. And the converse of the proposition, viz. that the burden of proof is on him against whom, unless he produce evidence, the issue must be found, seems to be held by the English courts. See the remarks of Lord Brougham in Waring v. Waring, 6 Moo. P. C. 341, as cited in note to § 184, and quoted with approval by Creswell, J, in Sutton v. Sadler, 3 C. B. N. s. 87. It would seem, while it may well be held that on the main issue in every case the burden of proof remains with the plaintiff,

statute expressly requires affirmative proof of sanity on the part of the proponent, it is held that the burden of proof must be sustained by other evidence than the presumption of sanity, and that the burden remains with the proponent to the end of the trial. And in Oregon the same view appears to be accepted.

SECTION V.

INSANITY EXISTING PRESUMED TO CONTINUE.

§ 187. As the law presumes that every man is sane until the contrary is proved, so it presumes that insanity, having been once shown to exist, continues until the contrary is

or in a case involving testamentary capacity, with the proponent, yet that, upon collateral issues arising in the progress of the cause, the burden may rest upon the defendant or proponent. And this principle has been, in effect, laid down in the courts of Massachusetts. in Commonwealth v. Eddy, 7 Gray, 583, Metcalf, J., said: "The burden is on the commonwealth to prove all that is necessary to constitute the crime of murder. But . . . in order to overcome" the presumption of sanity and shield the defendant from legal responsibility, "the burden is on him to prove . . . that . . . he was not of sane mind." The wide discussion to which this question has given rise has seemed to render necessary a fuller statement of the authorities than its practical importance will warrant. Lord Brougham remarks that nothing can "be less profitable as a guide to our ultimate judgment than the assertion which all parties are so ready to put forward in their behalf severally, that, in the question under consideration, the proof is on the opposite side." Waring v. Waring, 6 Moo. P. C. 341. In New Hampshire the court say: "In some sense it is not improper to say that the burden of proving the insanity of the testator is on the party opposing the will. If he relies on that fact, he must, of course, lay evidence before the jury sufficient to outweigh the presumption of law and the proof on the other side." And Bellows, J., adds: "This question has been discussed elsewhere with much diligence and keenness, but it is, after all, a question merely verbal; a question of the propriety of certain forms of expression; for we apprehend that whatever may be the terms used the course of practice is everywhere the same." Perkins v. Perkins, 89 N. H. 163.

- ¹ See McGinness v. Kempsey, 27 Mich. 363.
- ² Aikin v. Weckerly, 19 Mich. 482; and see Beaubien v. Cicotte, 8 Mich. 9.
 - * Hubbard v. Hubbard, 7 Oregon, 42.

made to appear, and this whether a permanent recovery or merely a lucid interval is alleged to have occurred. principle was laid down by Lord Chancellor Thurlow, as follows: "If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement; if such derangement be proved or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burden of proof attaches on the party alleging such lucid interval, who must show sanity and competence at the period the act was done, and to which the lucid interval refers." When the insanity proved is of the form known as monomania, or derangement of the faculties of the mind in reference to a particular subject, the rule applies as regards the quality of the party's acts in respect of such particular subject.² And it is held that where a party has been found incapable of managing his affairs by reason of habitual drunkenness, the court will not discharge his committee and restore his property to him on mere proof of the fact that he is competent to manage his affairs, without evidence of a permanent reformation.⁸ This rule applies to all cases, whether the character

¹ Attorney General v. Parnther, 3 Bro. C. C. 441. See also Cartwright v. Cartwright, 1 Phill. 90; White v. Driver, id. 84; Smee v. Smee, L. R. 5 P. D. 84; Hoge v. Fisher, 1 Pet. C. C. 163; Stevens v. Vancleve, 4 Wash. C. C. 262; Jackson v. Van Deusen, 5 Johns. 144; Goble v. Grant, 2 Green Ch. 629; Grabill v. Barr, 5 Penn. St. 441; Brooke v. Townsend, 7 Gill, 10; Taylor v. Creswell, 45 Md. 422; Pettes v. Bingham, 10 N. H. 514; Weston v. Higgins, 40 Maine, 102; Corbit v. Smith, 7 Iows, 60; Terry v. Buffington, 11 Ga. 337; Goodell v. Harrington, 8 Thomp. & Cook, 345; Emery v. Hoyt, 46 Ill. 258; Ripley v. Babcock, 13 Wis. 425; Achey v. Stevens, 8 Ind. 411; Rush v. Megee, 36 Ind. 69; Mullins v. Cottrell, 41 Miss. 291; Anderson v. Cranmer, 11 W. Va. 562; Chandler v. Barrett, 21 La. Ann. 58; 2 Greenl. Ev. § 689. Where a complaint was filed to obtain relief from a transaction between the plaintiff and defendant, made when the former was of unsound mind, and there was no averment of his restoration to sound mind, it was held that the court would presume the incapacity to continue, but that this objection to the complaint would be considered waived unless presented by the defendant's demurrer or answer. Wade v. The State, 87 Ind. 180.

² Thornton v. Appleton, 29 Maine, 298; Staples v. Wellington, 58 Maine, 453; Jenckes v. The Court of Probate, 2 R. I. 255.

^{*} Hoag, in re, 7 Paige, 312. It was remarked in this case that, as a

of a civil act or of an alleged crime of the subject be in controversy. And those courts which hold that, in order to a conviction in criminal cases, the defendant's sanity must appear beyond a reasonable doubt, appear also to hold that the same degree of proof is necessary to rebut the presumption that insanity, once existing, continues.

§ 188. When insanity has once existed, and a subsequent act of its subject is alleged to have been done in a lucid interval, it must be shown that capacity existed at the very time of the doing of the act, and it is said not to be sufficient to offer evidence of sanity before and after the day of the act.4 And this seems to be the rule even though the act in question appear, by itself, to be the act of a sane person.⁵ Thus where a will had been duly executed by one who subsequently became temporarily insane, and the will appeared to have been mutilated by the testator, it was held that the burden of proving that the mutilation had taken place while the testator was of sound mind was on the party alleging revocation, although the will had been in the testator's custody for a short time subsequent, as well as prior, to his insanity.6 So where one having executed a will subsequently became insane and died in that condition, and the will could not be found after his death, it was held that the presumption that the will was destroyed by the testator animo revocandi did not apply, and that the burden was on the contestant to show

general rule, the court would require as evidence of a permanent reformation satisfactory proof that the habitual drunkard had voluntarily refrained from the use of intoxicating liquors for at least one year immediately preceding the application for the restoration of his property.

- ¹ State v. Spencer, 1 Zab. 196; People v. Francis, 88 Cal. 188. See People v. Smith, 57 Cal. 180.
 - ² See ante, § 166 et seq.
 - * The State v. Reddick, 7 Kan. 143.
- White v. Wilson, 18 Ves. 87; Harden v. Hays, 9 Penn. St. 151; Kenworthy v. Williams, 5 Ind. 875; Saxon v. Whitaker, 80 Ala. 287. In the latter case it was held not sufficient to show that the testator had lucid intervals on the morning of and before "the execution of the will.
 - Waring v. Waring, 6 Moo. P. C. 841.
 - ⁶ Harris v. Berrall, 1 Sw. & Tr. 158.

that it was destroyed by the testator while of sound mind, there being no evidence as to the date of its destruction.1

§ 189. If insanity has once been found to exist, and the quality of an act of the subject subsequently committed be in issue, the law does not require, in order to prove the sanity of the act, that perfect restoration be shown. It will be sufficient if there be shown, beyond a mere cessation of violent symptoms, a restoration of mind sufficient to enable the party soundly to judge of the quality of the specific act.² And where one has been pronounced insane by the competent tribunal, as upon a commission de lunatico inquirendo, it is not necessary, in order to supersede the commission, that the mind should be restored to its original state, but proof of competence for the common purposes of life, as to make a will of personal estate, is sufficient.8 So it was said by Sir Edward Sugden: "If a man has been insane and afterwards recovers his reason, it is not sufficient, in order to impeach an act done by him after his recovery, to show that he was not as sound a man in his judgment as before his insanity. What the law requires is that a man should have possession of his

¹ Sprigge v. Sprigge, L. R. 1 P. & D. 608.

² Hall v. Warren, 9 Ves. 605; Boyd v. Eby, 8 Watts, 66; McMasters v. Blair, 29 Penn. St. 298; People v. Montgomery, 13 Abb. Pr. n. s. 207.

⁸ Ex parte Holyland, 11 Ves. 10. In Attorney General v. Parnther, 8 Bro. C. C. 441, "it is well known that Lord Thurlow went so far as to say that when lunacy is once established by clear evidence the party ought to be restored to as perfect a state of mind as he had before, and that should be proved by evidence as clear and satisfactory." See Eden's note. But Lord Eldon, in Ex parte Holyland, ubi supra, dissented from this proposition, and, in the course of an elaborate opinion, laid down the rule as stated in the text. See also White v. Wilson, 13 Ves. 88; White v. Driver, 1 Phill. 88; Cartwright v. Cartwright, id. 90. The rule as established in Hall r. Warren, ubi supra, and Ex parte Holyland is generally accepted as correctly stating the law; but in Groom v. Thomas, 2 Hagg. Ecc. 433 (1829), Sir John Nicholl said: "The party setting up any instrument executed after insanity has manifested itself has the burthen of proof cast upon him; he must show recovery, and . . . not merely that the party . . . was restored to a state of calmness and to the ability of holding rational conversation on some topics, but that his mind, having shaken off the disease, was again become perfect, was sound upon all subjects, and that no delusion remained."

reason so as to know the effect of the act he is about to perform, and to be capable of carrying that act into effect." 1

(a.) Exception to the Rule.

- § 190. The rule that where insanity is proved or admitted to have existed at any particular time it is to be presumed to continue, applies only to cases of what is called "general," or "habitual," insanity. Like all presumptions, it "arises from our observation and experience of the mutual connection between the facts shown to exist and those sought to be established by inference from those facts;"2 and where observation and common experience fail to show that the insanity proved in the particular case was in its nature permanent, the presumption fails. When insanity appears as the result of some special and temporary cause, and experience shows that the cause being removed the effect will probably disappear, the presumption does not prevail. Thus it does not apply to insanity caused by a violent disease, and, in such cases, the party alleging it in avoidance of an act "must bring his proof of continued insanity to that point of time which bears directly upon the subject in controversy, and not content himself merely with proof of insanity at an earlier period."8 And this is the rule although the existence of the disease, at a time subsequent as well as prior to the act in question, be shown.4
- § 191. Cases of "delirium" come within the exception stated, delirium being defined as "a fluctuating state of mind created by temporary excitement, in the absence of which, to be ascertained by the appearance of the patient, the patient is, most commonly, really sane." 5 So it is held that proof of periodical epileptic attacks attended with convulsions, loss of consciousness, and the usual sequences of such attacks, or

¹ Creagh v. Blood, 2 Jones & La T. 509; s. c. 8 Ir. Eq. 434.

² Hix v. Whittemore, 4 Met. 545.

^{*} Ibid.

⁴ Hall v. Unger, 4 Sawyer C. C. 672.

⁵ Brogden v. Brown, 2 Add. Ecc. 441; Puryear v. Reese, 6 Cold. 21; Clarke v. Sawyer, 3 Sandf. Ch. 351. See Legeyt v. O'Brien, Milward, 325.

proof of temporary pneumonia supervening such an attack, with fever and delirium, is not such proof of insanity as will justify the presumption of its continuance. And where it was contended that a deed was void on account of the grant-or's mental incompetency, arising from convulsive epilepsy, it was held that unless habitual insanity was shown, such as in its nature is continuous and chronic, the fact of competency was to be presumed and did not require proof. The same doctrine is held in cases involving testamentary capacity.

§ 192. The exception stated may further include cases of insanity or delirium induced by paralysis.4 And it is said: "It is no more a presumption of law that one rendered unconscious and incapable of mental action by a stroke of paralysis, will continue so for four months thereafter, than that he would if the same effect was produced by a blow on the head." In Pennsylvania it has been held that, on the question of the testamentary capacity of a dying man, the fact of an occasional flightiness or wandering of intellect during his sickness is generally of very slight importance, and that notwithstanding temporary mental disorder the presumption is that he is competent to make a will, and the contrary is to be proved.6 On the same question arising in the Irish court of chancery, the court say that where a testator's incapacity before and after the act done arises merely from heaviness or stupor, and there is no delirium, incapacity is not to be inferred in the interval; and that the existence of capacity must depend on the changes in the complaint and the degree of interest prompting exertion on the part of the The court adds that the presumption that, where testator.

- ¹ Brown v. Riggin, 94 Ill. 560.
- ² Aurentz v. Anderson, 3 Pitts. (N. P.) 310.
- ⁸ Carpenter v. Carpenter, 8 Bush, 283.
- 4 Burton v. Scott, 8 Rand. 399.
- ⁵ Trish v. Newell, 62 Ill 196. But where there was positive evidence of a testator's insanity and also of a paralytic attack shortly before the date of the will, it was held to be incompetent to prove that in nine cases out of ten paralysis produces no effect on the mind. Landis v. Landis, 1 Grant Cas. (Penn.) 248.
 - ⁶ McMasters v. Blair, 29 Penn. St. 298.

incapacity existed before and after the act, it existed at the time, does not apply to cases of stupor merely.¹

§ 193. Where long-continued inebriety exists, resulting in occasional paroxysms of insanity, the law does not require proof of a lucid interval to give validity to the acts of the drunkard.² So delirium tremens, being but a temporary madness and generally of short duration, he who alleges it as a defence to a criminal prosecution for an unlawful act must show that at the time the act was done he was suffering from a paroxysm of the disease. And its existence at the time of the act is not to be presumed from the occurrence of antecedent fits.⁸ But when long indulgence in inebriety has produced such a permanent derangement of the mind as would, had it arisen from other causes, excuse the act committed, the ordinary presumption of the continuance of the derangement, once existing, will prevail.⁴

- ¹ Blake v. Johnson, Milward, 162.
- ² Gardner v. Gardner, 22 Wend. 526; Halley v. Webster, 21 Maine, 461; Duffield v. Morris, 2 Harr. 375.
- ⁸ State v. Sewell, 3 Jones (N. C.), 245. See United States v. McGlue, 1 Curtis C. C. 1.
 - Gardner v. Gardner, ubi supra.

CHAPTER VIII.

OF EVIDENCE TO PROVE INSANITY.

SECTION I.

EFFECT OF PREVIOUS FINDING OF INSANITY.

§ 194. When the sanity of a party at the time of doing a particular act is questioned in a collateral proceeding, a former determination of the question as a principal issue by a competent tribunal may always be given in evidence. And such former adjudication of insanity will stand thenceforward, until reversed, as proof of the fact, and the burden of proof will shift to the party alleging the agent's sanity at the time of the act. So if the finding of the former tribunal established the sanity of the party, it seems that such finding, while not conclusive of sanity, is competent evidence to prove it. The same rules apply as to the effect of findings upon issues submitted to inquisition other than the principal issue of the party's sanity. Thus upon the English commission which directs the jury to inquire who is the next heir of the lunatic, in order that the crown may

¹ Sergeson v. Sealey, 2 Atk. 412; Faulder v. Silk, 3 Camp. N. P. 126; Cooke v. Turner, 15 Sim. 611. See also Van Deusen v. Sweet, 51 N. Y. 378; Shumway v. Shumway, 2 Vt. 339; Rippy v. Gant, 4 Ired. 443; Christmas v. Mitchell, 3 Ired. Eq. 535; Armstrong v. Short, 1 Hawks, 11; Hill v. Day, 7 Stew. Eq. 150; Yauger v. Skinner, 1 McCart. 389; Willis v. Willis, 12 Penn. St. 159; Gangwere's Estate, 14 Penn. St. 417; Lucas v. Parsons, 23 Ga. 267; Hassard v. Smith, 6 Ir. Rep. Eq. 429; and cases cited under the following sections. The effect, as evidence, of a finding that a party is an habitual drunkard is the same as that of a finding of lunacy. Lewis v. Jones, 50 Barb. 645. It is said that the finding of an inquest is evidence of lunacy for a jury, and does not merely operate to throw the burden of showing a lucid interval on the party alleging sanity. Rogers r. Walker, 6 Penn. St. 871.

² Hume v. Burton, Ridgway, 204; Gibson v. Soper, 6 Gray, 279.

know to whom his property shall be delivered upon his death, it was held that the person found by the jury to be the heir was, prima facie, entitled to take as such, but that finding of the jury upon the question was not conclusive. The effect of the finding, as creating a presumption of the party's insanity, will be the same whether the act in question be subsequent to the finding or antecedent to it but embraced within the period covered, or, as it is said when an inquisition de lunatico inquirendo has been had, "overreached" by the finding.²

§ 195. On the issue whether one was insane at a certain time, a bond found on file in the proper office, and appearing to be the official bond of his guardian, though not bearing the required certificate of approval, is held to be competent evidence, when coupled with the facts that no record of the appointment of guardians appeared to have been kept in the office, that the guardian was subsequently removed and another appointed in his place, and that the land of the alleged insane person was taxed to the guardian.8 But in the case of an inquisition finding a man to be an habitual drunkard, a committee having been appointed who neither gave security nor took charge of the property, which remained for many years under the control of the supposed drunkard himself; it was held that the facts raised a presumption of the abandonment of the proceedings and of the party's reform or restoration.4 Orders and reports made in the course of lunacy

¹ Fitzgerald, in re, 2 Sch. & Lef. 432.

² Rodd v. Lewis, 2 Lee Ecc. 176; Frank v. Mainwaring, 2 Beav. 115; Banker r. Banker, 63 N. Y. 409. Although the members of an inquest which has found a party to be of unsound mind are competent witnesses to prove facts bearing on his mental condition, so far as these are within their own knowledge, they cannot be examined for the purpose of proving what they conceived to be the nature of their finding, or that they did not intend to find or represent that the party had been of unsound mind for a period anterior to the inquisition, or that they did not know until after their report had been made that it was retrospective in its operation. Hutchinson v. Sandt, 4 Rawle, 234.

^{*} Edson v. Munsell, 10 Allen, 557; and see Thomas v. Hatch, 3 Sumner, 170.

⁴ Leckey v. Cunningham, 56 Penn. St. 370; Bixler v. Gilleland, 4 Penn. St. 156.

proceedings, while competent as evidence to show that such orders and reports were made upon the grounds stated therein, are not evidence of the facts therein mentioned or recited.¹ And it is held that letters of guardianship of a lunatic issued by a probate court cannot be questioned in a collateral proceeding, although there was an offer to show by the record that the supposed lunatic had never been served with process in the original proceedings, as required by law.²

§ 196. The effect of the principle stated as applied to the case of a will proved to have been executed within the period during which the testator is found by an inquisition to have been insane is thus stated by Dr. Lushington: "Under such circumstances it is competent to a party setting up a testamentary instrument to maintain: First, either that the deceased was always of sound mind; secondly, that though he may have been formerly of unsound mind, he had entirely and completely recovered; or, thirdly, that the will was made during a lucid interval. The presumption of law is, that the verdict of the jury was well founded, and that the deceased continued lunatic so long as the commission was not superseded."⁸ A finding of lunacy by an inquisition does not, of course, operate necessarily to make null a will which was not executed during the time covered by the finding.4 So, in determining the question of a testator's capacity to make an alteration in his will, although it is competent to use in evidence an inquisition by which the testator was found to be a lunatic some time before his death, it is for the jury to decide whether the alteration was made during the time covered by the finding.5

¹ Creagh v. Blood, 2 Jones & La T. 509. To prove the doings of selectmen of a town in committing a person to an insane hospital, their original record, or a transcript or authenticated copy of it, is admissible. Jay v. Carthage, 48 Maine, 353.

² Warner v. Wilson, 4 Cal. 810.

^{*} Prinsep v. Dyce Sombre, 10 Moo. P. C. 232. See also Bannatyne v. Bannatyne, 16 Jur. 864; Breed v. Pratt, 18 Pick. 115; Taylor's Will, Edmonds (N. Y.), 375; Rider v. Miller, 86 N. Y. 507; Searles v. Harvey, 6 Hun, 658; Titlow v. Titlow, 40 Penn. St. 483.

⁴ Hughes v. Hughes, 2 Mun. 209.

⁵ Hawkins v. Grimes, 13 B. Mon. 257.

§ 197. Like rules are applied when the issue is upon the validity of a deed of a grantor alleged to have been insane at the time of the factum. Thus where, after the filing of a bill in equity to foreclose a mortgage, the mortgagor was found lunatic by inquisition from a date overreaching the execution of the mortgage, and, upon the hearing, the inquisition was put in evidence, Lord Langdale held that upon this proof the burden was cast upon the mortgagee to prove the mortgagor's sanity at the date of execution. On the other hand, in order to establish the fact that the grantor in a deed was of unsound mind at the time of its execution, it is unnecessary to show that, at that time, he had been found insane in a proceeding instituted for that purpose.²

¹ Snooks v. Watts, 11 Beav. 105. See also Frank v. Mainwaring, Beav. 115; Osterhout v. Shoemaker, 8 Hill, 513; Hirsch v. Trainer, 3 Abb. New Cas. 274; Hunt v. Hunt, 2 Beas. 161; Hutchinson v. Saudt, 4 Rawle, 234; Wall v. Hill, 1 B. Mon. 290; Yauger v. Skinner, 1 McCart. 389; Clark v. Trail, 1 Met. (Ky.) 35; Titcomb v. Vantyle, 84 Ill. 371.

In Jacobs v. Richards; Same v. Porter, 18 Beav. 300, which were cases where, on a bill to foreclose a mortgage, the defendant produced the finding of an inquisition pronouncing the mortgagor insane at a date antecedent to the mortgage, together with some evidence aliunde tending to prove insanity at the date of the factum, but did not cross-examine the attesting witnesses to the mortgage by whom its execution was proved, Sir John Romilly, M. R., although no evidence in rebuttal was produced by the plaintiff, pronounced for the validity of the mortgage. He says: "It is the duty of the defendants to bring forward their own case to have this deed set aside," otherwise "it must be taken prima facie to be a good deed in this court;" and he appears to hold that, the deed being formally proved, the defendants should have brought their proof of insanity to the very time of the factum. Referring to Snooks v. Watts and Frank v. Mainwaring, he says: "If the defendants had thought fit to cross-examine the attesting witness, and had succeeded in showing that there was no valid deed, : . . the cases . . . might have applied." And further he says, there is a "great distinction between a deed proved in the ordinary manner and a contract which the party comes to enforce." It is somewhat difficult to reconcile this case with the weight of the authorities, or clearly to understand its reasoning; but it should be observed that the decision rested largely on technical grounds of objection to the form of proceeding and the fact that active relief was sought by the defendant.

² Freed v. Brown, 55 Ind. 310. This case was decided upon an application of the statute law of Indiana, but the principle stated is obvious and does not appear to depend on any statute provision. So it would

§ 198. The rules stated have been applied to cases where the validity of a contract of the person alleged insane was in question; 1 as where such person had made a promissory note,2 or a written agreement,8 or had signed a bond as surety.4 And they are also applied to cases where an action to annul a marriage is brought upon the ground of the insanity of a party alleged to exist at the time of the marriage. But in a case occurring in North Carolina, where the party had married during the time embraced by the finding of an inquisition declaring him lunatic, it was doubted whether the finding was of itself sufficient evidence of insanity on which to found a decree of nullity.6 Where, in an action by a husband against his wife for divorce on the ground of adultery, the defendant, without tendering the issue of insanity at the time of the act of adultery, pleaded a record adjudicating her a lunatic of a date two or three years before the act, it was held that the fact established by the record could not be contradicted, and that the presumption was that the lunacy continued and existed at the time of the adultery, but that the plaintiff might produce evidence to rebut the presumption of insanity.7

§ 199. In those jurisdictions where the proceedings to determine the sanity or insanity of the party are had in the courts of probate, and the insane person remains in the charge of a guardian appointed by the court until such guardianship is revoked, the effect of the existence of the guardianship as evidence of insanity is the same as that of the existence of a "finding" of lunacy by a commission de lunatico

seem to be obvious that the pendency of an action to establish one's insanity will authorize admission of testimony to prove him insane when he executed a mortgage. Knox v. Haslett, 12 Martin (La.), 255.

- ¹ Noel v. Karper, 53 Penn. St. 97; Parker v. Davis, 8 Jones, 460; Hopson v. Boyd, 6 B. Mon. 296.
 - ² Hicks v. Marshall, 8 Hun, 327; Ellars v. Mossbarger, 9 Bradw. 122.
 - ⁸ Goodell v. Harrington, 3 Thomp. & Cook, 345.
 - 4 Hart v. Deamer, 6 Wend. 497.
- ⁵ Turner v. Meyers, 1 Hagg. Cons. 414; Banker v. Banker, 63 N. Y. 409; Key v. Norris, 6 Rich. (S. C.) Eq. 388; Garnett v. Garnett, 114 Mass. 379.
 - ⁶ Johnson v. Kincade, 2 Ired. Eq. 470.
 - ⁷ Cook v. Cook, 53 Barb. 180.

inquirendo. In an early case in Massachusetts the court, by Parsons, C. J., held that the letter of guardianship was prima facie evidence of the ward's insanity, but declined to express an opinion as to whether, while unrevoked, it was conclusive.1 But later it was held that if it appear that a lunatic under guardianship be restored to his reason, he may make a valid will, although the letters of guardianship be unrevoked.2 This doctrine was afterwards affirmed by the same court in an opinion by Shaw, C. J., the court further holding that under such circumstances the fact of the testator's being under guardianship was prima facie evidence of insanity and incapacity to make a will, and that it was incumbent on the executor to show, beyond a reasonable doubt, that the testator had both such mental capacity and such freedom of will and action as are requisite to render a will valid.8 In a case in Vermont, where the defendant, being under guardianship as an insane person, was sued upon an alleged simple contract, Redfield, J., said: "When it affirmatively appears that the ward has recovered from his infirmity and is in possession of a sound mind, and conducting business in his own right and name, and the guardian 'does not interfere,' we see no good

- ¹ White v. Palmer, 4 Mass. 147.
- ² Stone v. Damon, 12 Mass. 488. See, to the same effect, Robinson v. Robinson, 39 Vt. 267; Jenckes v. The Court of Probate, 2 R. I. 255.
- * Breed v. Pratt, 18 Pick. 115. In the case of Leonard v. Leonard, 14 Pick. 280, it was held, where an insane person under guardianship had in his possession a promissory note payable to himself and received payment of it from the promisor, who had knowledge of the guardianship, that such payment was of no effect, and that the letter of guardianship was conclusive evidence that the ward was not of sound mind. The court said: "We are of opinion that as to most subjects the decree of the probate court, so long as the guardianship continues, is conclusive evidence of the disability of the ward; but that it is not conclusive in regard to all. For example, the ward, if in fact of sufficient ability, may make a will, for this is an act which the guardian cannot do for him." So far as this expression of opinion is applicable to the facts of the case, it goes no further than to hold that the letter of guardianship, which is prima facie evidence of insanity in a court of law, is conclusive, as to third parties, elsewhere, since nowhere else can evidence be produced to rebut it, and nothing but a legal adjudication can destroy the effect of the existence of the guardianship. See § 301, post.

reason nor rule of law that should shield him." And the same principles would seem to apply when, in the suit in which a party's sanity is put in issue, a guardian ad litem has been appointed for him on account of his alleged insanity.2

§ 200. It is held, and the rule appears to be justified by sound reasons, that a finding by a magistrate, or otherwise, upon a mere ex parte hearing, where no opportunity for a trial of the question of sanity has been had, is inadmissible as evidence to prove the insanity of the subject of the finding. Thus under the Massachusetts statute authorizing judges of probate summarily to commit to a lunatic hospital "any insane person who, . . . in their opinion, is a proper subject for its treatment or custody," 8 it was decided that such an order so committing the grantor in a deed was inadmissible to prove the grantor's insanity on an issue involving the validity of the deed. And the court distinguished the effect of such an order from that of the ordinary proceedings in lunacy, in which latter careful provision is made for notice to the alleged insane person, and for a full hearing, and a judicial determination of the mental condition of the party.4

§ 201. In several states it is provided by statute that all a person's acts and contracts, subsequent to the finding of an inquisition or other tribunal establishing his insanity, shall be absolutely void. Several cases have arisen involving the interpretation of these statutes. Thus in Pennsylvania it is said, in conformity to the general rule, that "the period of time antecedent to the date of the finding a condition of

¹ Blaisdell v. Holmes, 48 Vt. 492. And see Robinson v. Robinson, 39 Vt. 267; Hamilton v. Hamilton, 10 R. I. 538; Garnett v. Garnett, 114 Mass. 379.

² Little v. Little, 18 Gray, 264.

⁸ Pub. Sts. Mass. c. 87, § 11.

⁴ Leggate v. Clark, 111 Mass. 308. In this case the court say that a man may be a proper subject for the custody of a lunatic hospital, and yet of sufficient capacity to enter into valid contracts and to transact business, and that an order like that referred to in the text "does not pretend to declare the person committed to the hospital to be incapable of transacting business. It does not take from him the care and management of his estate. It affords a justification for the restraint of his person, but is not designed to fix his status."

lunacy or habitual drunkenness, and covered by it retrospectively, unlike that followed by such finding, is only prima facie a period of incapacity," while the finding "is conclusive on all the future." And, again, it is held that an inquisition is only persuasive evidence of incompetency as to contracts made before inquest though during the time overreached, but "as to contracts made after inquisition our statute contemplates a complete transfer of the property to the custody of the law. The commonwealth is substituted for the lunatic, and a lucid interval can avail nothing, for he [the lunatic] has nothing in respect to which to contract." 2

§ 202. Moreover, the statutes which declare void acts of one found insane, done after such finding, are not to be construed as settling the question of the sanity or insanity of the party, when this question is raised collaterally. For although the law holds a contract void while such finding exists in force, the effect of the finding is different when the issue is simply the condition of mind of the party. Thus if the quality of an alleged criminal act of the subject be in issue, the character of the act may, of course, be inquired into, notwithstanding the existence of the statute provisions referred to. In a criminal case where insanity was relied on as a defence, and it was shown that the prisoner four years before the act had been

¹ Klohs v. Klohs, 61 Penn. St. 245.

² Tozer v. Saturlee, 3 Grant Cas. 162. See also Imhoff v. Witmer, 81 Penn. St. 243; L'Amoureaux v. Crosby, 2 Paige, 422; Patterson, in re, 4 How. Pr. 34. In the latter case it is held that while the commission remains unrevoked a lunatic or habitual drunkard cannot make a valid will without the permission of the court, the existence of the commission being held conclusive against the validity of the will. But application may be made to the court for an order to remove this technical objection, which application is addressed to the discretion of the court, and may be ex parte or on notice to the committee and next of kin, as the court shall direct. And when the Chancellor becomes satisfied that a person found a lunatic has so far recovered his reason as to be able to dispose of his estate by will with sense and judgment, he has power to suspend proceedings against the lunatic, partially, so as to enable him to make a will. But he will direct such will made under the superintendence of some proper officer of the court so as to guard the testator against the immediate exercise of undue or improper influence. Burr, in re, 2 Barb. Ch. 208.

Per Thompson, C. J., in Leckey v. Cunningham, 56 Penn. St. 870.

adjudged insane and committed to custody in an asylum, it was held that this evidence was admissible as merely tending to establish the defence, but that it did not establish a prima facie case of incapacity, since "a person who is a fit subject for confinement in an insane asylum does not necessarily have immunity from punishment for crime." 1

§ 203. When a party is found insane upon an inquisition or otherwise, and the finding is afterwards "traversed," such finding is taken for proof of the party's insanity, prima facie; and on the trial of the traverse the burden of proof to establish sanity is upon the party alleging it. But such a party may, if the inquisition is afterwards produced in evidence against him in a collateral proceeding, impugn the finding by contrary evidence, without first pursuing the procedure technically known as a traverse.

§ 204. While insanity is to be considered as proved to have existed during the whole time overreached, until the finding is impeached by competent evidence, the ordinary presumption of sanity prevails up to such time.⁵ So it has been held that an inquisition was not admissible as evidence that its subject was a lunatic at a time four years before the date of the finding.⁶ And on the trial of an issue whether the grantor in a deed was of sound mind at the time of its execution, it is held that neither the judgment of the court setting aside his will, nor the record of the appointment of a guardian, made nearly a year after the date of the deed, is admissible.⁷

§ 205. The effect in collateral proceedings of the finding of an inquisition or other tribunal, empowered to try the question of sanity as a principal issue, has been stated. But a determination of the question in a collateral proceeding will not generally be allowed to have weight as creating any presump-

- ¹ Wheeler v. The State, 34 Ohio St. 894.
- ² See § 71, ante.
- ⁸ McGinnis v. The Commonwealth, 74 Penn. St. 245. See Shumway v. Shumway, 2 Vt. 339.
 - ⁴ Den v. Clark, 5 Halst. Ch. 217.
 - ⁵ Greenwade v. Greenwade, 43 Md. 818.
 - Shirley v. Taylor, 5 B. Mon. 99.
 - 7 Hovey v. Chase, 52 Maine, 304.

tion in other proceedings had upon a different issue. ception to this rule may occur when the former proceedings were had between the same parties, and when the quality of a similar act was in issue in both cases. Thus it was held, in Illinois, that a decree of a court of competent jurisdiction in the state of Indiana finding that a deceased grantor was, at the time of making a conveyance of lands in the latter state, insane and incapable of doing business, and therefore setting aside such a conveyance, was not only competent evidence of the grantor's insanity in a suit between substantially the same parties brought to avoid a conveyance of lands in Illinois, made by the same grantor at the same time when the deed of the Indiana lands was made; but that, when properly pleaded and relied on, the former adjudication was conclusive upon the defendants in the latter suit as to the fact of insanity.1

§ 206. A determination of the insanity of a party, as a collateral issue, will be conclusive only as to the subjectmatter over which the court determining such collateral issue has jurisdiction. Thus in New York it was held that though a testator be found insane by the Chancellor, on appeal from proceedings had for the probate of his will before a surrogate, yet such finding is conclusive only as regards the disposition of the testator's personal estate; and that the question whether or not there is a valid devise of the testator's real estate remains open, and can only be set at rest through an issue framed, or trial at law. The Vice-Chancellor said: "The question before the Chancellor was whether the will of J. F. was valid as a will of personal property only? Now the point is whether it is good as a will to pass real estate. It is true that both of these depend upon the same state of facts and circumstances: the mental capacity of the testator. Nevertheless, the decision of them confessedly belongs to different tribunals, and would have to be determined by a different course of proceeding and mode of trial. In England the first

Hanna v. Read, 102 Ill. 596. And see People v. Farrell, 81 Cal. 576; and ch. xiii. sec. v., (b). As to the effect of an inquisition held abroad, or in another state, upon the rights of the party, see Perkins, in re, 2 Johns. Ch. 124; and §§ 39, 40, ante.

is confided to the ecclesiastical courts; and, under our system, it is left to the surrogates. While the latter, both here and in England, is determined by the common-law courts. . . . If there be any absurdity in this, it is one that has long been perceived, but never remedied."

§ 207. When, in an action at law or in equity, the defendant, for the purpose of abating the suit, seeks to prove that the plaintiff was insane at the time it was commenced, proceedings establishing the fact of such insanity are admissible as evidence.² And it is held that an inquisition of lunacy found against a witness is *prima facie* evidence of his incompetency to testify, although it be offered against one who was not a party to the proceedings in lunacy.⁸ But a witness, although insane, may testify, if it appear that he has mental power sufficient to comprehend the subject-matter of the suit in which he is called, and to comprehend his duty as a witness.⁴

§ 208. Upon the supersedure of a commission, or the revocation of a guardianship in lunacy, the subject is presumed to be fully restored; and, as affecting the consideration of his subsequent acts, the adjudication of insanity is thereafter without effect. It has been said that the discharge of the patient from a lunatic asylum, for the reason that its officers believe him restored, would be *prima facie* evidence, at least, of restoration; but this expression would seem to be intended to mean that, on the evidence of such discharge appearing, a jury or court of equity would be justified in finding, as a matter of fact, that the patient was restored to his right mind.

¹ Bogardus v. Clarke, 3 Edw. Ch. 266 (1832). See also Montgomery v. Clark, 2 Atk. 378; Hume v. Burton, 1 Ridgway, 277; Vanderheyden v. Reid, Hopk. Ch. 408; Reid v. Vanderheyden, 5 Cow. 719.

² M'Creight v. Aiken, Rice (S. C.), 56.

^{*} Hoyt v. Adee, 3 Lansing, 73.

⁴ See ch. x. sec. ix., post.

⁵ Haynes v. Swann, 6 Heisk. 560, 587, per Nicholson, C. J.

SECTION II.

COMPETENCY OF SPECIFIC FACTS.

§ 209. It may be said generally that, on the question of the capacity of a party to make a civil contract or execute a valid will, the law will look rather to his substantial business acts, than to his conversations or occasional doings not connected with business.1 Thus while the mere fact that a person makes improvident bargains, or is generally unthrifty or unsuccessful in his business, does not, of itself, prove him to be non compos mentis, such fact is competent evidence, in connection with other facts and circumstances, to show mental unsoundness.2 And while evidence that a testator inherited a large property and that it had greatly diminished in his hands was held inadmissible, by itself, to prove want of capacity, it was said that if there had been an offer to prove any particular act of folly connected with the management or disposition of the property, this would have been admissible.⁸ So evidence that a testator, during the latter part of his life, did not keep his buildings in as good repair as previously, has been held competent, in connection with other evidence, as tending to prove his incapacity.4 Evidence that the surety on a promissory note was, when he signed it, a creditor of the principal for a large amount, and that the principal was without means or credit, is held inadmissible to show the incapacity of the surety to make a valid contract.⁵ But in an action to recover property sold by one alleged to have been insane at the time of the sale, the vendee having introduced testimony as to the amount and value of consideration paid, it was held competent for the plaintiff, in connection with other proof of the vendor's incapacity and the vendee's knowledge of it, to prove that the value of the property sold was

¹ Turner v. Hand, 3 Wall. Jr. C. C. 88.

² Carmichael, in re, 86 Ala. 514.

^{*} Hall v. Hall, 17 Pick. 873. See Kenworthy v. Williams, 5 Ind. 875.

⁴ Hamilton v. Hamilton, 10 R. I. 538.

Noel v. Karper, 53 Penn. St. 97.

greater than the price to be given, and that, in fact, the full consideration had not been paid.1

- § 210. It seems that evidence as to a party's religious, political, or moral beliefs, if unsupported by other testimony, will not generally be admitted to prove his insanity.2 And it is held that no belief as to the nature or existence of rewards and punishments in a future state can be regarded as evidence of insanity, since there is no test by which the truth of such a belief can be ascertained.3 An irritable temper and excitable disposition are not, of themselves, evidence of insanity; 4 but it has been held that sudden irritability, moroseness, and unprovoked profanity, indicating a complete and radical change of disposition, may be shown, in connection with other facts, as tending to prove insanity.⁵ So while depravity of character and lascivious and abandoned habits are not, of themselves, competent evidence of insanity,6 it has been held competent to show that a testator who had been mild, amiable, and modest, had become irritable, harsh, and obscene in the presence of his family, had spoken of his intercourse with women in the presence of his daughters, and had attempted improper familiarities with them; although on some subjects his mind appeared to be sound.7
- § 211. It is true, in general, that evidence is competent tending to show the fact of bodily sickness or weakness of the party before the date of the act in controversy, the character of such sickness, and the time and duration of its existence; but such evidence is not conclusive upon the issue of mental infirmity.⁸ Thus evidence that a complainant, before
 - ¹ Henry v. Fine, 23 Ark. 417.
- ² See §§ 8, 14, ante, and cases cited; but see Robinson v. Adams, 62 Maine, 369.
 - ⁸ Gass v. Gass, 3 Humph. 278; Brown v. Ward, 53 Md. 376.
 - 4 Willis v. People, 32 N. Y. 715.
 - ⁵ Conely v. McDonald, 40 Mich. 150.
 - ⁶ Hill v. Hill, 12 C. E. Green, 214.
 - 7 Bitner v. Bitner, 65 Penn. St. 847.
- 8 Halley v. Webster, 21 Maine, 461; Boswell v. The State, 63 Ala. 807; Clinton v. Estes, 20 Ark. 216; Irish v. Smith, 8 S. & R. 573. Evidence tending to show that the party had delirium tremens at or about the time of the act sought to be avoided is held admissible. Real v. The

the making of a contract sought to be rescinded on the ground of his incapacity, had a severe attack of illness, and thereafter was a less active enterprising business man than before, that he was a man of intemperate habits, that he was subject to occasional fits arising from habits of intoxication, and that his mind was less vigorous than when his habits were correct; has been held not to prove, by itself, that he was deprived of his right reason or incapable of managing his affairs or business.¹ The fact that a person was, in appearance, too imbecile to make intelligible communications to his counsel has been held not incompetent, notwithstanding the professional relation existing between the parties, since, while professional communications are privileged, the fact that disease prevented them from being made is not.²

§ 212. It is generally held that the age of the party whose capacity is in question is never, of itself, a competent fact upon the issue of his capacity; and under a statute making parties to civil suits competent witnesses therein, one party having testified in his own behalf, it was held that the facts that the adverse party was at the time of the trial nearly seventy years old, had had a paralysis within three years, was of weak mind and poor memory, had an idiotic look, was sometimes stupid, but brighter some days than others, that on one occasion within a few days of the trial he was unable to move or dress himself, and did not seem to understand anything about his business, were not such clear evidence of his insanity as to make it the duty of the court to grant a new trial on account of the admission of the other party to testify in his own favor.

§ 213. Letters written by the person alleged to be insane within the period during which the inquiry is allowed to extend, are competent evidence upon the issue;⁵ and where

People, 55 Barb. 551. But the mere fact that the party was an habitual drunkard is not admissible. Odd Fellows Mut. Life Ins. Co. v. Rohkopp, 94 Penn. St. 59.

- ¹ Doughty v. Doughty, 8 Halst. Ch. 641 (opinion by Green, C. J.).
- ² Daniel v. Daniel, 39 Penn. St. 191.
- * See § 8, ante, and cases cited.
- 4 Doud v. Hall, 8 Allen, 410.
- ⁸ State v. Kring, 64 Mo. 591.

the evidence introduced extended over the whole lifetime of the party, it was held not incompetent to admit, in rebuttal, letters written by him ten years before. But letters written to the party, although in reply to verbal messages received from him, are not admissible, unless it be shown that he exercised some act of judgment and understanding upon the subject-matter of them. It is said, however, that the least act done by the party in relation to such letters would render them admissible. Applying a like principle to that stated, it is held that a journal kept by the master of a ship, who was alleged to be insane, might be read in evidence to prove his sanity by the style in which it was kept, but not as evidence of any fact stated in it. And entries made in a book by a testator are held to be admissible as tending to show the condition of his mind at the time such entries were made.

§ 214. It seems that the fact of a testator's hostility to his kindred may be given in evidence upon the question of his capacity, when such hostility was apparently causeless, or based on delusion.6 It is said that, in connection with other testimony bearing upon the issue of mental competence of a testator, evidence of the bad reputation of the person named in the will as executor is competent, if it be shown that such reputation was known to the testator. Where the principal legatee in a will, who was born in lawful wedlock two or three years after his mother's marriage with the testator, bore in his personal appearance the distinctive marks of a negro, such as woolly hair and a mulatto complexion, his mother and testator being white persons of fair complexion, the fact of the testator's belief that the legatee was his son was held competent evidence for the purpose of showing delusion on this subject.8

- ¹ Sayres v. The Commonwealth, 88 Penn. St. 291.
- ² Waters v. Waters, 35 Md. 531; Wright v. Tatham, 5 Cl. & Fin. 670.
- ⁸ Doe v. Wright, 6 Nev. & Mann. 132; Wright v. Tatham, 7 Ad. & El. 317.
 - 4 United States v. Sharp, 1 Peters C. C. 118.
 - ⁵ Irish v. Smith, 8 S. & R. 573.
 - 6 Brown v. Ward, 53 Md. 376.
 - 7 McGinness v. Kempsey, 27 Mich. 9.
 - ⁸ Florey v. Florey, 24 Ala. 241.

§ 215. In a capital case, where the defendant was indicted for the murder of his wife, proof that she had long been guilty of adultery and that the defendant knew it, was held incompetent as tending to show insanity, in the absence of other evidence in the same direction; since a jury is not authorized to find a person insane, without some proof on the subject other than the fact that a cause existed that might tend to produce insanity. But where there was evidence tending to show that a person who had disappeared had been for a considerable time afflicted with a severe and dangerous disease of the brain and spine, which his physician thought must have proved fatal in a short time and probably have rendered him insane, and there was evidence of the effect of the disease on his feelings and conduct, indicating that it affected his mind, it was held that there was sufficient evidence of insanity to justify the court in submitting the question to the jury.2

SECTION III.

DECLARATIONS OF THE PARTY.

§ 216. When the quality of a particular act, as sane or insane, is in controversy, the question of the admissibility in evidence of the doer's statements and declarations, for the purpose of affecting the validity of the act, has been much discussed. The better opinion seems to be that, unless they make a part of the res gestæ of the transaction, such statements and declarations are, of themselves, inadmissible to invalidate an act done contrary to the intentions or purposes expressed. But as evidence to show the condition of the party's mind merely, at the time such declarations were made, these may be admissible under the general rule which, upon the issue of sanity, admits as evidence the acts and declarations of the party alleged to be insane. If admitted, they

¹ Sawyer v. The State, 35 Ind. 80.

² John Hancock Mut. Life Ins. Co. v. Moore, 34 Mich. 41.

^{*} Hayes v. West, 37 Ind. 21; Rutherford v. Morris, 77 Ill. 397; Quisenberry v. Quisenberry, 14 B. Mon. 481; Frazer v. Jennison, 42 Mich. 206.

are confined in their application simply and exclusively to prove the state of the party's mind. In conformity with a general rule of evidence, their admissibility in particular cases will depend on their degree of remoteness, in respect of time or connection from the act in issue; and in the application of this rule it is immaterial as a fact of itself, whether statement or declaration offered in evidence was antecedent or subsequent to the act in controversy.

§ 217. In conformity with these principles it is held that, in order to impeach the validity of a deed, evidence of the declarations of the grantor, made while he was of sound mind, prior to the execution of the deed, as to his intentions respecting the disposal of the granted premises, is admissible, when "offered among other circumstances tending to prove unsoundness of mind, especially if it is a deed of gift disposing of the grantor's estate among his children, and omitting any provision for the issue of a deceased child." So it was held

- ¹ Harring v. Allen, 25 Mich. 505; Gibson v. Gibson, 24 Mo. 227; Reynolds v. Adams, 90 Ill. 134; Mooney v. Olsen, 22 Kan. 69.
- ² In State v. Scott, 1 Hawks, 24, it was held, under the general rule making the declarations of a party incompetent as evidence in his behalf unless they accompany acts and make a part of the res gestæ, that such declarations are not admissible, of themselves, to show the insanity of the accused in a capital case. And the same rule was applied in State v. Vann, 82 N. C. 631 (citing State v. Huntley, 3 Ired. 418; State v. Tilley, id. 424), but with a limitation to declarations made after the commission of the alleged crime. The rule stated in State v. Scott was disapproved by the same court in Norwood v. Marrow, 4 Dev. & Batt. Law, 442, where it was held that declarations made by a grantor the next day after executing the deed were admissible, not to establish the truth of the things declared, but as tending to prove the grantor insane. And in McLean v. The State, 16 Ala. 672, it was said that the case of State v. Scott "stands alone." The true rule would seem to be that declarations of the party may be admissible though unaccompanied by acts, if made under circumstances which preclude the probability of their having been made to influence the issue. It is obvious that the most convincing proof of insanity may in some cases be the declarations of the party, as tending to show the unreasoning quality of his mind.
- * Howe v. Howe, 99 Mass. 88. It was further held in this case that evidence that several months afterwards the grantor remembered executing the deed, understood what he had done thereby, gave his reasons therefor, and expressed no regret or dissent, was admissible as tending

that the condition of the grantor's mind one or two years after the execution of the deed was, if connected by other evidence with periods of time in close contiguity with the time of the act, admissible to show his mental condition when the deed was executed. So it was held that while declarations of a grantor made subsequently to the execution of a deed are inadmissible as direct evidence to invalidate the act, yet when the question was whether the grantor were sane or insane at the time the deed was executed, it was competent to give in evidence his declarations made soon after the act, for the purpose of proving the imbecility of his mind.2 But in a case where no evidence was offered of the insanity of a grantor except his declarations that he had not executed a certain deed, and knew nothing of it, and that if he had executed it, that he wanted the witness to get the property back again, such evidence was held, on general grounds, inadmissible, either to invalidate the deed, or for the purpose of proving insanity, because the declarations offered might as well have been the fruits of a well-conceived deceit as of a vacant mind.8

§ 218. The principles stated obtain when the issue is upon testamentary capacity. The rules to be applied in this class of cases are carefully stated by Selden, J., in the case of Waterman v. Whitney, where it is held (1) that where the

to show sanity and ratification. And see Sutton v. Sadler, 3 C. B. n. s. 87, where it was held no misdirection to tell the jury that they might take into consideration statements made by a testator as to the dispositions contained in his will, and which statements corresponded therewith, for the purpose of throwing back light on the period at which the will was executed (a year before), and of affording the means of inferring what was the state of his competency at that period.

- Wilkinson v. Pearson, 23 Penn. St. 117. In this case it was held that, there being evidence to show one's incapacity to make a deed, it might be shown that more than two years before the date of the deed the grantor had said, being then sane, that the grantee had importuned him to make such a deed, but that he was determined never to do so, the evidence being admitted, in connection with evidence of insanity appearing in the case, for the purpose of showing the grantor's intentions when sane.
 - ² Chess v. Chess, 1 Penn. Rep. 32.
 - * Stewart v. Redditt, 3 Md. 67.
 - 4 11 N. Y. 157.

issue is upon the mental condition of a testator at the time of the making of the will, his subsequent statements, touching the disposition of his property and inconsistent with the provisions of the will, will be competent evidence in connection with other testimony tending to show want of testamentary capacity; 1 (2) but when, from remoteness in point of time, such statements can have, apparently, no bearing as evidence on the mental condition of the testator at the time of the factum, they are not competent evidence; (3) "on a question of revocation of a will, no declarations of the testator are admissible except such as accompany the alleged act by which the will is revoked, . . . as part of the res gestæ;"² (4) when fraud, imposition, or duress are alleged to have been exerted upon the testator, but the question of his mental capacity is not in issue, his prior or subsequent declarations are inadmissible in evidence.8

- § 219. In conformity with the rules stated, it is held that though a will cannot be defeated by proof that it does not embody the testator's intentions as expressed at a previous time, yet in a case where a testator, being absent from home, had devised all his estate to a stranger, and there was evi-
- See also Shailer v. Bumstead, 99 Mass. 112; McTaggart v. Thompson, 14 Penn. St. 149; Rambler v. Tryon, 7 S. & R. 94; Bates v. Bates, 27 Iowa, 110; Reynolds v. Adams, 90 Ill. 134; Stevens v. Vancleve, 4 Wash. C. C. 262; Reel v. Reel, 1 Hawks, 247, as commented on in Waterman v. Whitney. In the latter case Selden, J., criticises the expressions contained in 2 Greenl. Ev. § 690, where it is said that, though insanity existing in the testator before and after the factum may be proved, his declarations will be inadmissible unless forming part of the res gestæ, citing Smith v. Fenner, 1 Gallis. 170. But in the latter case the issue was upon alleged fraud or circumvention, and the capacity of the testator was not in question.
- ² Disapproving a contrary doctrine laid down in Durant v. Ashmon, 2 Rich. 484. See also Bibb v. Thomas, 2 Wm. Bl. 1044; Dan v. Brown, 4 Cow. 483; Jackson v. Betts, 6 Cow. 377.
- * To the same point see Jackson v. Kniffen, 2 Johns. 31; Smith v. Fenner, 1 Gallis. 170; Comstock v. Hadlyme, 8 Conn. 254; Moritz v. Brough, 16 S. & R. 403. But see Bates v. Bates, 27 Iowa, 110, where it is said that "declarations of the testator, whether made before or after the making of the will, are competent evidence to show the mental incapacity of the testator, or that the will was procured by undue influence."

dence tending to show his insanity at the time of the devise, it was permitted to be shown that the testator lived on amicable terms with his sisters, and that, some months before his departure from home, he had said that his property would go to them.¹ But where the testator's wife was one of his devisees, declarations of the testator evincing hostile feelings towards her, and made some months before the date of the will, were held not admissible as evidence to prove his insanity, although proffered in connection with the fact that he had made a former will, different in its provisions from that in controversy.²

SECTION IV.

DECLARATIONS OF DEVISEES.

§ 220. In cases where the testamentary capacity of a party is put in issue upon the offer of his alleged will for probate, or on an issue devisavit vel non, framed to ascertain his capacity, the question of the competence as evidence of the declarations of devisees affirming the insanity of the testator has been widely discussed. Such declarations are admitted, if at all, as coming under the general rule which makes the declarations of parties to the record, made against their own interest, competent evidence. But the reason of the rule does not apply to the offer as evidence of declarations made before the execution of the will by the devisees under it, since, before the execution of the will, the devisees cannot be taken to have anticipated that a will would be made which it would be against their interest to have defeated. The same rule is applied to declarations made after the

¹ Norris v. Sheppard, 20 Penn. St. 475.

² Kachline v. Clark, 4 Whart. 316. And see Titlow v. Titlow, 54 Penn. St. 216, where it was held that frequent declarations of the testator, within ten years before his death, that he liked a brother better than his other relations, were not evidence on the question of his sanity. In Colvin v. Warford, 20 Md. 357, it was held that the declarations of a testatrix when sane, that she was crazy when she executed a particular will, are evidence from which the jury may infer, in connection with other facts, that she had not testamentary capacity when such will was executed.

execution of the will, when it appears that at the time of making them the declarant was ignorant of the fact of execution.¹

§ 221. When the declaration proffered in evidence was made by one of several devisees, there is a conflict of authority upon the question whether the declaration is admissible. The objections to the competence of such a declaration as evidence rests upon the ground that declarations of one of several parties in a similar interest shall not be admitted to prejudice the rights of the others, unless there be a privity arising from a joint interest or combination of all the parties. And on this ground declarations by one of several devisees are held inadmissible in Alabama, Iowa, Ohio, Virginia, Pennsylvania, Massachusetts, and West Virginia. Upon

Ames's Will, 51 Iowa, 597; Burton v. Scott, 3 Rand. 399; Hunt v. Hunt, 3 B. Mon. 575; but see, contra, Dennis v. Weeks, 46 Ga. 514; Peeples v. Stevens, 2 Rich. (S. C.) 198. See also Plant v. McEwen, 4 Conn. 544. Declarations affirming the incapacity of a testator by a party sustaining the will are inadmissible when the offer of the testimony is made without limitation as to time, place, and circumstance. Thompson v. Kyner, 65 Penn. St. 368.

- ² Roberts v. Trawick, 13 Ala. 68; Blakey v. Blakey, 33 Ala. 611.
- * Ames's Will, ubi supra.
- 4 Thompson v. Thompson, 13 Ohio St. 356.
- ⁵ Burton v. Scott, 3 Rand. 399.
- ⁶ Bovard v. Wallace, 4 S. & R. 499; Nussear v. Arnold, 13 S. & R. 823; Boyd v. Eby, 8 Watts, 66; Hauberger v. Root, 6 W. & S. 481; Clark v. Morrison, 25 Penn. St. 453.

7 Shailer v. Bumstead, 99 Mass. 112. In Phelps v. Hartwell, 1 Mass. 71 (1804), which is said to be the earliest case upon the subject, the court declined to admit a declaration of one of the devisees in the form of a mere opinion that the testator was insane. Later, in the case of Atkins v. Sanger, 1 Pick. 192, the court admitted the declarations of one of the legatees "as to facts which took place at the time of the making of the will." And the court added that the decision did not interfere with that in Phelps v. Hartwell. Although the decision in Atkins v. Sanger seems not consonant, as to the admission of the declarations of one of several legatees, with that in Shailer v. Bumstead, ubi supra, yet the cases of Phelps v. Hartwell and Atkins v. Sanger recognize a principle which seems to have been lost sight of in many of the reported cases; i. e., that the admissibility of the declarations proffered may depend upon their

⁸ Forney v. Ferrell, 4 West Va. 729.

the point the court in Pennsylvania say: "The general rule of law consonant with reason is, that one person is not to be prejudiced by the unauthorized declarations of another. The exception to the rule is found in those cases where there is a joint interest or privity of design between several. In such cases each is presumed to speak for the whole; but where there is neither joint interest nor combination, where each claims independently of the other, the words of one, no more than his acts, can bind the other. The interests of these devisees and legatees are several and not joint; and hence the three who would impeach it were bound, on principle, to produce evidence that was competent as against all the rest." 1

§ 222. The contrary rule, that upon the issue of testamentary capacity where several devisees are parties the statements of any one of them made in regard to the testator's capacity are competent as evidence against all, is adopted in Kentucky,² and has also been held in Tennessee,³ North Carolina,⁴ and, it seems, in South Carolina,⁵ and Georgia.⁶ In Missouri such declarations are held competent evidence when they relate to the condition of the testator's mind at the time of the factum.⁷ In Maryland it has been held that declara-

quality as being mere opinions, or as being recitals of facts. Since it is universally admitted that a mere opinion, unsupported by a statement of the facts on which it is based, is inadmissible as evidence to prove insanity (see sec. x., post), it is difficult to perceive why a declaration which merely expressed the opinion of the declarant, without a statement of the facts on which it was founded, ought to be admitted as evidence for the somewhat artificial reason that it was made against the interest of the declarant, especially in those jurisdictions where, as in Massachusetts, opinions, even in conjunction with statements of the facts on which they are founded, are held inadmissible on an issue of sanity.

- ¹ Clark v. Morrison, ubi supra.
- ² Beal v. Cunningham, 1 B. Mon. 899; Rogers v. Rogers, 2 B. Mon. 824; Milton v. Hunter, 13 Bush, 163.
 - ⁸ Brown v. Moore, 6 Yerger, 272.
 - ⁴ McCraine v. Clark, 2 Murph. 817.
- ⁵ Peeples v. Stevens, 2 Rich. 198; but see Dillard v. Dillard, 2 Strob. 89.
 - ⁶ Dennis v. Weeks, 46 Ga. 514.
 - Armstrong v. Farrar, 8 Mo. 627.

tions adverse to the validity of a will, made by one who was a contingent devisee thereunder, and also executor, and a defendant of record in a suit to test the validity of the will, were competent at the trial of issues framed upon a caveat to the will.¹

§ 223. It seems to be an admitted rule, to be implied from the tenor of the authorities already cited, that when the declaration as to the capacity of the testator is made by a sole legatee or devisee, or is the joint declaration of all the legatees or devisees, such declaration is admissible upon the issue of the testator's capacity. Several dicta in support of this view appear in the reported cases.² And it is even held that, upon such an issue, the opinions of the party opposing the will in favor of the testator's sanity, expressed out of court, may be given in evidence by the executor in support of the will.⁸

§ 224. The declaration of a husband of a female legatee, he having a larger interest in the estate as heir-at-law than his wife would take under the will, is held to be incompetent as evidence against the validity of the will.⁴ So the declarations of the wife of one of the legatees as to the mental competency of the testator are held inadmissible, although subsequent to making such declarations the wife was, upon the death of the husband, made a party defendant in the cause.⁵ In an action of ejectment by the devisees of A. against one claiming under a deed from A., executed by B.,

- ¹ Davis v. Calvert, 5 Gill & J. 269, 271, 805.
- ² See Nussear v. Arnold, 13 S. & R. 323; Boyd v. Eby, 8 Watts, 66; Burton v. Scott, 3 Rand. 399; Blakey v. Blakey, 33 Ala. 611.
 - * Ware v. Ware, 8 Maine, 42.
 - 4 Walker v. Walker, 34 Ala. 469.
- ⁵ Coryell v. Stone, 62 Ind. 307. In Brewer v. Ferguson, 11 Humph. 565, it was held, on an issue of devisavit rel non, where the widow of the testator was offered by the contestant as a witness to establish his insanity, she having no interest in the issue, that she was incompetent, on the general ground that at common law neither husband nor wife is a competent witness for or against the other. But in Irish v. Smith, 8 S. & R. 573, evidence that the testator's wife said in his presence "that he did not attend to business, that he was incapable," to which the testator made no reply, was held to be admissible.

compos mentis at the date of the deed, it was held that evidence of the declarations of B. that A. was non compos mentis, made about the time of the execution of the power of attorney and deed, was inadmissible. The evidence was offered on the ground that the admissions were those of an agent, and rejected on the ground that they were not admissions made in course of the business of the agent.¹

SECTION V.

OF THE ACT ITSELF AS EVIDENCE.

§ 225. When the question of the sanity of the party at the time of the commission of a civil act is in controversy, the nature of the act itself as reasonable or unreasonable may be considered, in connection with its attending circumstances and the other evidence in the case, as competent evidence bearing upon the issue of the sanity of the party, and the consequent validity or invalidity of the act; 2 and it is conceivable that a civil act may in its nature appear so clearly to be that of an insane person as to be admissible, though not accompanied by other evidence, to prove its own invalidity. The courts have not, however, admitted this rule in · criminal cases; and it is said in a capital case that, where no more than the homicide is proved, the overwhelming barbarity of the act will not be admitted as evidence of insanity, for then the more unnatural and brutal the crime, the stronger would be the ground of defence.8 And in another case Gibson, C. J., answering the suggestion that there was intrinsic evidence of insanity from the nature of the homicide committed, said: "To the eye of reason, every murderer

¹ Bensell v. Chancellor, 5 Whart. 871.

² Clark v. Fisher, 1 Paige, 171; Duffield v. Morris, 1 Del. Ch. 120; Hall v. Unger, 4 Sawyer C. C. 672; Bitner v. Bitner, 65 Penn. St. 347; Campbell v. Hill, 22 U. C. C. P. 526; s. c. 23 U. C. C. P. 478.

^{*} State v. Stark, 1 Strob. 479; Laws v. The Commonwealth, 84 Penn. St. 200. In the latter case it is added that proof, aliter, of insanity being given, the barbarity of the act may give weight to such proof.

may seem a madman, but in the eye of the law he is still responsible." 1

§ 226. But whatever weight may attach to the act considered as evidence, it can never, as matter of law, be conclusive of the issue. The law does not presume the character of any act considered as sane or insane, but in all cases leaves the question to be determined as a matter of fact by the jury.2 This principle has been often applied in cases where the fact of the suicide of the party has been produced as evidence of his insanity at the time of the suicide. In such cases it is held that there is no presumption, prima facie or other, that selfdestruction is the result of insanity.8 In an early case it is said: "It is a vulgar error that none of sane mind can be felo de se, and that whosoever kills himself must be non compos. For if he be compos as to other acts, that sole act shall not. denominate him non compos." 4 It seems that this principle will hold even when the suicide is committed by one who was insane at a period shortly antecedent to the act, but his insanity was of a nature intermittent and not habitual in its character; 5 and suicide committed shortly after the doing of some other act in controversy is not conclusive evidence of insanity at the time of such act.6 It follows, where it appeared that one had committed suicide by shooting, and there was some evidence that he had also taken poison, and a letter written by him was found in which he declared that he had suffered from fear of becoming insane by reason of the exist-

¹ Commonwealth v. Mosler, 4 Penn. St. 264.

² See § 151, ante.

^{*} Terry v. Ins. Co., 1 Dillon C. C. 403; Merritt v. The Cotton States Life Ins. Co., 55 Ga. 103; Duffield v. Morris, 2 Harr. 875; Regina v. Barton, 3 Cox C. C. 275; M'Adam v. Walker, 1 Dow, 148; and cases cited ante, § 151; but see Coffey v. Home Life Ins. Co., 3 Jones & Spencer, 314.

⁴ Rex v. Coroner de ——, Comberbach, 2. See also Rex v. Saloway, 8 Mod. 100.

⁵ McElwee v. Ferguson, 43 Md. 419. It is said that the presumption that a sane man found dead has not committed suicide does not extend to the case of an insane man so found. Germain v. Brooklyn Life Ins. Co., 26 Hun, 604.

⁶ M'Adam v. Walker, ubi supra; Brooks v. Barrett, 7 Pick. 94; Pettit v. Pettit, 4 Humph. 191.

ence of maladies which he despaired of curing, and had decided to end his life by poison; and it further appeared that he was afflicted with a disease the tendency of which was to produce a morbid mental condition; that he was a spiritualist; that for some days before the act he was a little excited, absent-minded, and not as cheerful and talkative as usual,—the refusal of the court below to submit the question of insanity to the jury was approved.¹ It follows, the act of suicide being admitted and no other evidence of insanity appearing in the case, that the burden of proof does not shift, but remains with the party alleging the existence of insanity.²

§ 227. The rule stated has often been applied to cases involving the question of testamentary capacity, and it appears to be settled that the provisions of the will itself may be competent evidence in determining whether it is the offspring of a sound and disposing mind, all the circumstances and the surroundings of the testator being considered. Thus it is said that a will written by the testator propria manu, and reasonable in its terms, will require strong evidence to overset it; 4 and it has been held that "a legitimate inquiry is . . . whether the will is natural," and " to that inquiry the pecuniary condition of the testator's heirs-at-law was pertinent," and that evidence on that subject was admissible. But the mere fact that children of the testator are left without provision in his will is of no weight further than as a circumstance tending, in connection with other evidence, to show the mental incapacity of the testator; 6 for it is said, "if the

¹ Fowler v. Mutual Life Ins. Co., 4 Lansing, 202; Weed v. Mut. Benefit Life Ins. Co., 70 N. Y. 561.

² Ibid.

^{*} Wheeler v. Alderson, 4 Hagg. Ecc. 574; Spence v. Spence, 4 Watts, 165; Chandler v. Ferris, 1 Harr. 454; Higgins v. Carlton, 28 Md. 115; Le Bau v. Vanderbilt, 3 Redf. 384; Denson v. Beazley, 34 Tex. 191.

⁴ Fulleck v. Anderson, 8 Hagg. Ecc. 527; Mullins v. Cottrell, 41 Miss. 291.

⁵ Stubbs v. Houston, 33 Ala. 555.

Addington v. Wilson, 5 Ind. 137. In White v. Bailey, 10 Mich. 155, it was held, where the testator was a feeble old man, residing with one whom he had made his legatee to the exclusion of his children, that it was competent for the proponent to prove facts which might well have alien-

testator is of sound mind, he may dispose of his property as he pleases, and the will will not be avoided because the disposition is unnatural or inequitable." 1

§ 228. The question has been discussed whether the fact that a will is reasonable in its provisions and written by the testator sua manu is to be considered the best evidence of capacity. In a leading case, where the testator had been found lunatic by an inquisition, his will, drawn by himself, was held to afford proof of a lucid interval from the internal evidence afforded by the fitness of its dispositions, and its being made in conformity with intentions expressed previous to the insanity. Sir John Nichol said: "I think the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself; that I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act, rationally done, the whole case is proved." 2

§ 229. It is to be observed that in Cartwright v. Cartwright the internal evidence afforded by the will itself was taken only in connection with the fact that the will purported to effectuate the intentions of the testator expressed when sane, and that the expression by Sir John Nichol keeps this fact in view. So, though the case has been cited as holding the view that the internal evidence contained in the will is absolutely the best evidence upon an issue of capacity,³ it hardly sustains such a proposition. A later English case goes no further than to hold that where one afflicted with habitual insanity, with intermissions, makes a will, the fact that the will is a rational one and made in a rational manner, though not conclusive, is strong evidence of its having been made in a lucid interval.⁴ And this expression appears to be in accordance with the better view of the law, expressed

ated the testator from his children. And see Dietrick v. Dietrick, 5 S. & R. 207.

- ¹ Fountain v. Brown, 38 Ala. 72; Snow v. Benton, 28 Ill. 306.
- ² Cartwright v. Cartwright, 1 Phill. 90.
- * See Weir's Will, 9 Dana (Ky.), 440; Overton v. Overton, 18 B. Mon. 61; Brock v. Luckett, 4 How. (Miss.) 459; Beller v. Jones, 22 Ark. 92.
 - 4 Nichols v. Binns, 1 Sw. & Tr. 239.

in an American case as follows: "It has been said that where a rational act has been done in a rational manner, such is the strongest and best proof which could arise as to a lucid interval. This rule has . . . been . . . so far questioned as to place it in this form, that while a rational act done in a rational manner is entitled to great weight, and does contribute to the establishment of a lucid interval, yet it is not the strongest and best proof. . . . It is believed, however, that . . . the authorities agree that if no extraneous influence was exerted the character of the act itself will go far to determine the capacity of the party at the time." 1

(a.) Of the Motive for the Act.

§ 230. In criminal cases, the question of the weight as evidence to be attached to the motive, apparent or inferred, which impelled the accused to the commission of the act, has been often discussed. It may be said, generally, reasoning solely from the inference hence arising, that when a sane and reasonable motive for the commission of an act is shown the inference is that the act itself is sane, and that the contrary inference is to be drawn when it is shown conclusively that the act was inspired by an insane motive. But the fact that no sane motive is discoverable will not justify the inference that it does not exist. Gibson, C. J., says: "It is urged that the want of motive is evidence of insanity. . . . But a motive need not always be shown—it may be secret; and to hold every one mad whose acts cannot be accounted for on the ordinary principles of cause and effect would give a general license. The law itself implies malice, where the act is accompanied with such circumstances as are the ordinary symptoms

¹ Corbit v. Smith, 7 Iowa, 60; and see 1 Jarman, Wills, 65; Bannatyne v. Bannatyne, 16 Jur. 864; Stewart v. Lispenard, 26 Wend. 255; Means v. Means, 5 Strobh. 167; Couch v. Couch, 7 Ala. 519. See Banks v. Booth, 6 Mun. 385, for a case in which it was held that notwithstanding a paper purporting to be a will was proved in a chancery suit to have been wholly written and subscribed by the testator, yet if on the evidence, there being no attesting witness, it be doubtful whether he had capacity, the court ought to direct issues to ascertain such fact before any decision of the cause.

of a wicked, depraved, and malignant spirit,—a heart regardless of social duty, and deliberately bent upon mischief." And a probability, however strong, that the motive of a particular act was insane will not justify the jury in presuming that the act was that of a lunatic, unless such probability be re-enforced by evidence aliunde. Hornblower, C. J., says: "If we witness the perpetration of an act without any apparent motive or object, but against every motive which would appear to be naturally influential with the person committing it, we are at once awake to the inquiry whether he was in his sound mind; and if we lay hold of any sufficient evidence that he was not so, this absence of apparent motive confirms us in the belief that he was insane." 2

SECTION VI.

COMPETENCY OF FACTS IN POINT OF TIME.

§ 231. When the validity of any civil act is questioned on the ground of the alleged mental incompetency of the doer, the point of time to be considered is that at which the specific act in controversy was done; for although the doer may have been mentally incapable of doing a like act at any time before or after the doing of the specific act, yet unless such prior or

¹ Commonwealth v. Mosler, 4 Penn. St. 264.

² State v. Spencer, 1 Zab. 196; and see Regina v. Layton, 4 Cox C. C. No motive, however foolish or wicked, is to be considered as an insane motive, so long as it be such as may be conceived to influence a "The resemblance to the conduct of other men, required to sane man. constitute sane behavior, is generic, not specific; or, if the terms are preferred, not substantial, but formal. Any degree of ignorance, vice, or folly is perfectly consistent with it. A man murders his father, robs him of 5s., and conceals his crime so clumsily as to ensure his own detection. In what sense is this conduct sane? It is sane because there is an object proposed founded on an ordinary motive, and a rational adaptation of means to ends." Stephen, General View of the Criminal Law of England, So it is said that when such motives appear "as might naturally induce a man of depraved and wicked heart and violent and ungovernable passions to perpetrate the crime of which he stands accused, we cease to look for other causes of the deed committed." State v. Spencer, ubi supra.

subsequent act bears as evidence upon the specific act, and in its nature tends to show incompetency to perform it, it has little weight as evidence. Thus the fact that one was insane some years before a certain act, and cured, is of no weight as showing that he was insane at the time of such act. But the law, within reasonable limits, permits evidence of such prior or subsequent incompetency to be given.2 And it is held that greater latitude in the admission of testimony should be allowed when the issue is as to mental condition than is permitted in relation to a single ordinary fact.8 This principle has been often applied in cases where testamentary capacity was in issue; and it has been said, in regard to antecedent facts in such cases, that any lapse of time occurring between the date of their occurrence and the point of time in controversy does not affect their admissibility, but only their weight, as evidence.4 Thus it has been held that all the facts of the personal history of the testator for more than twenty years might be given in evidence under the issue. And it is held generally that evidence of insanity existing both before and after the execution of the will is competent upon the issue of capacity.6

§ 232. But while it is true that when the issue is upon the insanity of a party no absolute rule limiting the extent of the examination to fixed periods can be laid down,7 yet the courts will hesitate to admit as evidence of insanity facts

¹ Snow v. Benton, 28 Ill. 306.

² Stevens v. Vancleve, 4 Wash. C. C. 262; State v. Kelly, 57 N. H. 549; Whitenack v. Stryker, 1 Green Ch. 9; Turner v. Cheesman, 2 McCart. 243; Beavan v. M'Donnell, 10 Exch. 183; Peaslee v. Robbins, 3 Met. 164; Bryant v. Jackson, 6 Humph. 199; Laros v. The Commonwealth, 84 Penn. St. 200; Russell v. The State, 53 Miss. 367; Gray v. Obear, 59 Ga. 675; Watson v. Watson, 11 Ala. 43.

⁸ Robinson v. Adams, 62 Maine, 369.

⁴ Conely v. McDonald, 40 Mich. 150.

⁵ Ross v. McQuiston, 45 Iowa, 145; Fairchild v. Bascomb, 35 Vt. 398; Robinson v. Adams, 62 Maine, 369.

Grant v. Thompson, 4 Conn. 203; Davis v. Calvert, 5 Gill & J. 269; Negroes v. Townsend, 9 Md. 145; Boylan v. Meeker, 4 Dutch. 274; Ford v. Ford, 9 Humph. 92; Toomes's Estate, 54 Cal. 509; Anderson v. Cranmer, 11 W. Va. 562.

⁷ Clinton v. Estes, 20 Ark. 216.

occurring after the act in controversy, unless there be other testimony in the case, either tending to prove antecedent insanity, or connecting the subsequent insanity alleged with the act itself.1 Thus on the trial of the validity of a will executed when the testatrix was seventy-eight years old, there was held to be no good ground of exception to the exclusion of evidence of her mental and moral condition fifteen months afterwards, when she was affected with paralysis; and also of evidence of her condition at subsequent periods, until her death at nirety-one years of age, which evidence was offered to show that she was weak in body and mind when she executed the will.2 But if a foundation be laid for such testimony, it is held admissible. Thus where it was sought to set aside a conveyance on the ground of the insanity of the grantor, and it appeared that the insanity had been of slow and steady growth, it was held that testimony as to her mental condition for five years after the conveyance was admissible, she being totally insane at the time of the trial. But it is said that the testimony would have been inadmissible had the insanity been temporary or intermittent in its character.8 And where the alleged incapacity was the result of gradual decay from old age, it was held proper to introduce evidence of capacity existing after the date of the factum.4 Where testimony had been introduced to show that a testator's mental condition at the factum was the same as at a subsequent period, proof of incapacity at the latter period was held competent.⁵ On the trial of a suit to set aside a deed made two years before, on the ground of the grantor's insanity, it was held that the jury might properly consider the alleged lunatic's appearance before them, there being evidence that he manifested a like demeanor at the time of the factum.6 But, in the absence of evidence tending to show that the

¹ Commonwealth v. Pomeroy, 117 Mass. 143; Choice v. The State, 31 Ga. 424.

² Shailer v. Bumstead, 99 Mass. 112.

⁸ Ashcroft v. De Armond, 44 Iowa, 229.

⁴ Pinney's Will, 27 Minn. 280.

⁵ Terry v. Buffington, 11 Ga. 337.

⁶ Koile v. Ellis, 16 Ind. 301.

demeanor of the party at the trial is the result of the insanity alleged to have existed at the time of the act, such evidence is held to be incompetent.¹

- § 233. The principles stated apply to evidence offered in rebuttal by the person maintaining the sanity of the party. Thus it is held that where evidence of acts, conduct, and declarations of the accused, at various periods of his life, is introduced in defence to prove his insanity at the time of the commission of a crime, the prosecution is not limited in rebuttal to an explanation or denial of the particular acts, conduct, or declarations so put in evidence in behalf of the prisoner, but may offer evidence of other acts, conduct, or declarations of the accused to show that he was sane within the same period.² And where a defendant had introduced evidence tending to prove his insanity "at and before" the time of the execution of a note declared on, the plaintiff was permitted to show the mental condition of the defendant seventeen days after the execution of the note.8 It is not necessary, in order to enable the proof of such other acts, conduct, and declarations to be regarded as rebutting testimony, that the prosecution should show the accused to have been of sound mind at the time to which they refer. The defence being insanity, the evidence of such acts is not an attack upon the character of the prisoner before he has put his character in issue, but is rebutting testimony, admitted in
- ¹ Bowden v. The People, 12 Hun, 85. See Regina v. Goode, 7 Ad. & El. 536. In People v. Montgomery, 13 Abb. Pr. n. s. 207, which was a case of homicide, where the defence was insanity ascribed to epileptic fits from which it was proved the accused had suffered, and there was some evidence tending to the opinion that the prisoner was simulating a want of intelligence at the trial, it was held that the occurrence of an epileptic fit after the trial was only cumulative evidence, and no ground for a new trial.
- ² United States v. Holmes, 1 Clifford C. C. 98. See also State v. Kring, 62 Mo. 591; Sayres v. The Commonwealth, 88 Penn. St. 291; Robinson v. Adams, 62 Maine, 369.
- * Walker v. Clay, 21 Ala. 797. In Thayer v. Thayer, 9 R. I. 377, it was said that the court will form their opinion as to the mental condition of the party from the testimony of witnesses who have been long acquainted with him, and that of medical experts, in preference to any personal examination.

order that the jury may compare the prisoner's conduct on different occasions together, and thus judge understandingly upon the question in controversy.¹

§ 234. When the evidence of insanity offered consists of the conduct or declarations of a party occurring subsequent to an act the quality of which is in issue, and where the effect of the evidence will be in favor of the party himself, the question of the admissibility of such evidence will be carefully considered. The principles already laid down have been stated in their application to such cases as follows: "Upon the question of sanity at the time of committing an offence, the acts, conduct, and habits of the prisoner at a subsequent time may be competent as evidence in his favor. But they are not admissible as of course. When admissible at all, it is upon the ground, either that they are so connected with or correspond to evidence of disordered or weakened mental condition, preceding the time of the offence, as to strengthen the inference of continuance, and carry it by the time to which the inquiry relates, and thus establish its existence at that time; or else that they are of such a character as of themselves to indicate unsoundness to such a degree or of so permanent a nature as to have required a longer period than the interval for its production or development. The interval is to be measured, not merely by length of time, but also with reference to intervening events. These may be such as to account for the peculiarities manifested, either by showing a sufficient originating cause, or by furnishing other explanations. . . . It is for the party offering such evidence to establish its competency against the double, and, in this case, triple, objection: first, that it is subsequent in point of time; second, that it is the party's own conduct offered in his favor; and, third, that it is his conduct while under arrest, charged with the offence."2

¹ United States v. Holmes, 1 Clifford C. C. 98.

² Opinion by Wells, J., in Commonwealth v. Pomeroy, 117 Mass. 143, 147. This was a capital case, in which the evidence of insanity offered was the general conduct of the defendant while confined in jail under indictment and awaiting trial.

SECTION VII.

FACT OF HEREDITARY INSANITY.

- § 235. It has been held upon the trial of the issue of insanity that proof that other members of the family of the person alleged insane had been of unsound mind was not admissible either in civil or criminal cases.¹ But in a leading American case it is said that this view of the law is now rejected as unphilosophical and unsound, and that proof of the insanity of either parent, or even of a more remote ancestor, is competent evidence upon the issue. And the court admitted evidence tending to show mental unsoundness in the brother of the defendant, to be considered in connection with other evidence of the defendant's insanity appearing in the case.² The modern rule seems to be that evidence of insanity either in the ancestors or collateral relations of the party will be competent, if offered in connection with evidence of the insanity of the party whose act is in issue,³ and if it further
- ¹ M'Adam v. Walker, 1 Dow, 148, 174; Chitty, Med. Jur. 354; and see Doe v. Whitefoot, 8 C. & P. 270; Hagan v. The State, 5 Baxt. (Tenn.) 615.
- ² People v. Garbutt, 17 Mich. 10, overruling M'Adam v. Walker, ubi supra.
- * People v. Smith, 31 Cal. 466; People v. Garbutt, ubi supra; Bradley v. The State, 31 Ind. 492; Laros v. The Commonwealth, 84 Penn. St. 200. In this case Agnew, C. J., said: "The court is not bound to hear evidence of the insanity of a man's relatives, or evidence of his proper instruction in morals and religion, or of the kind treatment of his relatives and friends, as grounds of the presumption of possible insanity, until some evidence has been given that the prisoner himself has shown signs of his own insanity." To the same effect see State v. Cunningham, 72 N. C. 469; Snow v. Benton, 28 Ill. 306. In State v. Simms, 68 Mo. 305, an instruction that the fact that some or all of the defendant's ancestors had been insane did not, of itself, prove the defendant insane, and that, in the absence of direct and preponderating evidence of insanity at the time of the killing, it could not be justified, was held erroneous, on the ground that it was an expression of opinion on the weight of the evidence, and as such was "calculated to make an impression on the mind of the jury that evidence of the insanity of one of defendant's aunts and two of his sisters . . . was not worthy of much consideration." See § 155, anle.

appears that the kind of insanity alleged is in its nature hereditary.1

§ 236. When the existence of hereditary insanity is alleged as an excuse for crime, it must appear that the kind of insanity proposed to be proved as existing in the prisoner is no temporary malady, but that it is notorious, and of the same species with which other members of the family have been afflicted.2 Where, in an action on a policy of life insurance, the defendant, in order to show the insanity of the father of the party insured, called the superintendent of an insane asylum, who had no personal knowledge of the father, but who testified that it appeared from the records that he was twice admitted to the asylum, it was held that this evidence was incompetent. In the same case a copy of records of a probate court in Ohio, stating that the court visited the father, held an inquest, and, on the testimony produced, held him to be a lunatic, was also offered in evidence. But no proof of the authority given to this court by the laws of Ohio being offered, it was held that this evidence also was incompetent to show the insanity of the father.3 Where it was shown that a testator had suffered from three attacks of paralysis, one before the making of his will, from the effects of which he partially recovered, a second shortly after making the will, and a third which resulted in his death, it was held no error to exclude proof that the same disease had affected the testator's ancestors and blood relations. as that fact could not have any tendency to show the effect of the malady on the testator's mind.4

- ¹ Regina v. Ross Tucket, 1 Cox C. C. 103.
- ² State v. Christmas, 6 Jones (N. C.), 471.
- * Newton v. Mut. Benefit Life Ins. Co., 15 Hun (N. Y.), 595.
- 4 Meeker v. Meeker, 75 Ill. 260. In the cases, Baxter v. Abbott, 7 Gray, 71, State v. Windsor, 5 Harr. (Del.) 512, and Commonwealth v. Haskell, 2 Brews. (Penn.) 491, the court appear to hold, contrary to the authorities cited, that evidence of insanity existing in the party's family is admissible per se, though unconnected with other corroborative evidence. But in each of those cases evidence aliunde tending to show the insanity of the party was admitted, and it would seem that the expressions of the court on the subject, in so far as they conflict with the rule stated in the text, were unnecessary to the decision of the question presented.

SECTION VIII.

REPUTATION.

§ 237. It is not competent to prove insanity by evidence of the reputation or opinion of the neighborhood in which the person alleged to be insane resides. The rule excluding such evidence rests upon two grounds: first, because it is inadmissible under the general rule which makes hearsay evidence incompetent, and is not included within the exceptions to that rule; and, second, because the opinions of sworn witnesses, when unaccompanied by a statement of the facts on which such opinions are based, are inadmissible upon a question of sanity, and, a fortiori, the opinions of persons not under oath are inadmissible. Family reputation and the declarations of parents or relatives of the person alleged insane are excluded upon the same grounds.2 This rule applies to criminal as well as to civil cases.8 But where it is sought to prove the existence of previous insanity in deceased members of a party's family, it is held that reputation, in the family, of such previously existing insanity is competent evidence on the principle which admits like proof of births, deaths, and genealogies.4

SECTION IX.

FORMER WILL OR DEED.

- § 238. Resting upon the same principle as the rule already stated in regard to declarations of the party alleged to be insane, is the rule as to the competency of prior wills or deeds, which may be put in evidence, not for the purpose of showing the fact of a different disposition of the property devised or
- ¹ Foster v. Brooks, 6 Ga. 287; Pidcock v. Potter, 68 Penn. St. 342; Lancaster Bank v. Moore, 78 Penn. St. 407; Brinkman v. Rueggesick, 71 Mo. 553; Ashcroft v. De Armond, 44 Iowa, 229.
- ² Wright v. Tatham, 1 Ad. & El. 3; Townsend v. Pepperell, 99 Mass. 40.
- * State v. Hoyt, 47 Conn. 518; Choice v. The State, 31 Ga. 424; Brinkley v. The State, 58 Ga. 296; Stewart v. The State, id. 577.
 - 4 State v. Windsor, 5 Harr. (Del.) 512.

granted, but solely to show the condition of the mind of the testator or grantor at the time of the execution of the will or deed, or at some other time antecedent or subsequent to the act, but connected by the testimony in the case with the time of the act itself. Thus a testator was found to be a lunatic, with lucid intervals, and, after the finding, made a will. On the trial of a feigned issue under this will, it appeared that instructions had been given by him, a short time before he was found insane, for the drafting of another will, which was drawn accordingly, and was different from that in dispute. It was held that both wills might be put in evidence; and it was said that although a change of intention is of no importance if there be a sound mind, unconstrained, yet when the question is whether there be such a mind, the fact of such change may be adduced to aid the inquiry.1 The practice indicated, as applied to wills, obtains in the English ecclesiastical courts.2

§ 239. This rule has been applied to the case of a will disputed on the ground of incapacity, where the testator having been twice married, and leaving children by each marriage, the will proffered purported to devise all the testator's property to the issue of the latter marriage, and recited advancements to the children of the former marriage. It was held that a former will containing devises to the children excluded by the second will was competent, as a foundation for showing incapacity, without it being first shown that the

¹ Titlow v. Titlow, 54 Penn. St. 216. And see Wood v. Sawyer, Phillips (N. C.), 251; Hughes v. Hughes, 31 Ala. 519 (overruling on this point Roberts v. Trawick, 13 Ala. 68); Fountain v. Brown, 38 Ala. 72; Tobin v. Jenkins, 29 Ark. 151; Kachline v. Clark, 4 Whart. 316; Irish v. Smith, 8 S. & R. 573; Love v. Johnston, 12 Ired. 355. In Stevens v. Vancleve, 4 Wash. C. C. 262, one party having offered proof that the other had purloined a will executed before the one the validity of which was in issue, the court said: "Such evidence is improper, as it is not pretended by counsel that they mean to prove the contents of that will and to rest their defence upon it." It does not appear that it was proposed to offer the contents of the purloined will as evidence upon the question of the testator's mental condition.

² See Dodge v. Meech, 1 Hagg. Ecc. 612; Marsh v. Tyrell, 2 Hagg. Ecc. 84; Mynn v. Robinson, id. 169.

advancements recited by the will in controversy had never been paid. It is said that a will made during a period in which the testator is admitted to be insane is admissible for the purpose of rebutting any presumption of sanity arising from the form and character of a later will offered for probate. The earlier will seems to have been admitted on the ground that, under the circumstances of the case, all the facts in the personal history of the testator, that had occurred for more than twenty years, were admissible upon the issue.²

SECTION X.

OPINIONS, ORDINARY.

§ 240. Except in the case of the attesting witnesses to a will, the mere opinions of persons not experts are inadmissible as evidence upon the question of a party's insanity. But it is held generally in the American courts, when a person's mental condition or capacity is in question, that the opinions of non-professional witnesses in regard to such capacity, derived from personal observation of, and conversation with, such person, are admissible in evidence when taken in connection with the facts upon which such opinions are founded.

- ¹ Rankin v. Rankin, 61 Mo. 295.
- ² Ross v. McQuiston, 45 Iowa, 145.
- Brooke v. Townsend, 7 Gill, 10; Hyer v. Little, 5 C. E. Green, 443; Hunt v. Hunt, 3 B. Mon. 575; Shirley v. Taylor, 5 B. Mon. 99; Dicken v. Johnson, 7 Ga. 484; Bowling v. Bowling, 8 Ala. 538; McCurry v. Hooper, 12 Ala. 823; Pelamourges v. Clark, 9 Iowa, 1; Kenworthy v. Williams, 5 Ind. 375; Turner v. Cook, 36 Ind. 129; Rambler v. Tryon, 7 S. & R. 90. And the opinion of a non-professional witness as to whether, under a given state of facts and circumstances, a person if sane would have taken his own life is inadmissible. St. Louis Mutual Life Ins. Co. v. Graves, 6 Bush, 268.
- Cram v. Cram, 33 Vt. 15; Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232; Hardy v. Merrill, 56 N. H. 227 (overruling the previous decisions of the court upon the point); Beaubien v. Cicotte, 12 Mich. 459; Grant v. Thompson, 4 Conn. 203; Clark v. The State, 12 Ohio St. 483; Clary v. Clary, 2 Ired. 78; Baldwin v. The State, 12 Mo. 223; State v. Erb, 74 Mo. 199; Walker v. Walker, 14 Ga. 242; Choice v. The State, 31 Ga. 424; Wood v. The State, 58 Miss. 741; Webb v. The State, 5 Tex.

The rule admitting this class of testimony constitutes an exception to the general rule of evidence which excludes the opinions of witnesses who have not some peculiar skill or professional knowledge in relation to the matter in issue, although such opinions are derived from the witnesses' personal observation, and are offered to be given in evidence in connection with the facts on which they are based. Proof of expressions of opinion made out of court as to the sanity or insanity of a party are inadmissible upon the issue of the party's mental capacity, being mere hearsay, as well as unsupported by a statement of the facts on which they are founded. So the declarations of a testator, made at the time of the factum, were held inadmissible to prove the insanity of the testator's son, for whose benefit the will created a trust.

§ 241. To lay a foundation for the admission in evidence of such opinions, the specific facts upon which the opinions are based must first be stated by the witness, or his testimony must show that such intimate and close relations have existed between the party alleged to be insane and himself as fairly to lead to the conclusion that his opinions will be justified by his opportunities for observing the party. But the mere "impressions" of one who has had only a passing acquaint-

App. 596 (overruling previous decisions in the same state); Garrison v. Blanton, 48 Tex. 299; Norris v. The State, 16 Ala. 776; Leach v. Prebster, 39 Ind. 492; Schlencker v. State, 9 Neb. 241; Smith v. Hickenbottom, 11 N. W. Rep. Iowa (1882); Kilgore v. Cross, 1 McCrary C. C. 144; Pinney's Will, 27 Minn. 280; and see cases cited infra.

- ¹ Crane v. Northfield, 33 Vt. 124.
- ² Gray v. Obear, 59 Ga. 675.
- * State v. Stickley, 41 Iowa, 232; Roe v. Taylor, 45 Ill. 485 (where it is said that the expression of opinion in Van Horn v. Keenan, 28 Ill. 445, was not intended to be decisive of the point); Farrell v. Brennan, 32 Mo. 328; Stewart v. Spedden, 5 Md. 434; Dorsey v. Warfield, 7 Md. 65; Waters v. Waters, 35 Md. 531; Dennis v. Weeks, 51 Ga. 24; Doe v. Reagan, 5 Blackf. (Ind.) 217; Sutherland v. Hawkins, 56 Ind. 343; State v. Newlin, 69 Ind. 108; Colee v. The State, 75 Ind. 511.
- 4 Brooke v. Townsend, 7 Gill, 10; Weems v. Weems, 19 Md. 334; Brickner v. Lightner, 40 Penn. St. 199; Florey v. Florey, 24 Ala. 241; Stubbs v. Houston, 33 Ala. 555; Fountain v. Brown, 38 Ala. 72; Stuckey v. Bellah, 41 Ala. 700; People v. Sanford, 43 Cal. 29; Brooks's Estate, 54 Cal. 471; Beller v. Jones, 22 Ark. 92.

ance with the party are inadmissible as evidence.¹ The question whether a witness has stated facts and reasons sufficient to render his opinion upon the issue competent evidence, is to be determined by the court in all cases. But the question of the cogency of such facts and reasons as affecting the weight to be given to the opinion of the witness is for the jury.²

§ 242. In support of the rule as stated, it is said that the impression made on the mind of a witness by the conduct, conversation, and business transactions of any person is not mere opinion: it is knowledge, and is to be admitted upon a principle strictly analogous to that under which opinions upon questions of personal identity and handwriting are admitted.8 It is also said that "in the case of insanity a witness may state facts, may give the look of the eye and the actions of the man, but unless he is permitted to tell what they indicate, or, in other words, be permitted to express an opinion, he cannot convey to the mind distinctly the condition of the man that such acts and looks portray. As rebutting testimony, it is certainly competent to ask a witness whether in his opinion the subject is not of sound mind. The weight and value of an opinion is a very different thing from its admissibility as evidence. Unless the witness gives the facts upon which his opinion is founded, then such an opinion ought not to be admitted."4

§ 243. Thus it seems that opinions, though admissible with the limitations stated, are only to be considered as of weight

- ¹ Carmichael, in re, 36 Ala. 514.
- ² Gray v. Obear, 59 Ga. 675.
- * Brooke v. Townsend, 7 Gill, 10.
- Williamson, C. in Vanauken, in re, 2 Stock. 186. And see opinions of Ellsworth, J., in Dunham's Appeal, 27 Conn. 192, and of Selden, J., in De Witt v. Barley, 17 N. Y. 340 (explaining Same v. Same, 9 N. Y. 371), where it is held that such cases belong to that class of exceptions to the general rule in which opinions are received ex necessitate, for the reason that the minute appearances upon which they depend cannot be so perfectly described as to enable a jury to draw a just conclusion from them. Questions of identity, of handwriting, mental imbecility from old age, and some questions of value belong, with others, to this class. So the existence of drunkenness in the subject, and its effect upon his capacity, are questions depending upon the observation of ordinary witnesses, and are not to be determined by expert testimony. See Pierce v. Pierce, 38 Mich. 412.

so far as they illustrate the character and effect upon the mind of the witness of the facts on which they are based. And it is said in a leading English case that "the court does not depend upon the opinions of witnesses, but upon the facts to which they depose." So, in cases involving testamentary capacity, it is held that no judicial tribunal would be justified in deciding against the capacity of a testator upon the mere opinions of witnesses, however numerous or respectable, for the opinions of witnesses must be brought to the test of facts, so that the court may judge of the weight to which the opinion is entitled.2 And where a testator by his will gave power to his son, a semi-imbecile, to make a testamentary disposition, under certain restrictions, of the property devised to him by the will, it was held that this fact did not establish the testamentary capacity of the son, and that it was to be treated as the opinion merely of the father in regard to the son's competency to make a will.8

§ 244. Applying the principles already stated, it was held in an action for the probation of a will, where the issue was as to whether the testator's capacity had been impaired or destroyed by sickness, that a witness not an expert, who was well acquainted with the testator, and who had had the care of him in sickness, might be allowed to testify that he saw no difference between the testator's mental condition in sickness and his mental condition in health.⁴ So it is held that the question whether a party acted at a specified time like a sane or like an insane person may be asked of any witness who has had opportunity for observing the fact, though such witness be not an expert.⁵

§ 245. A witness, not a medical man nor expert, will not

¹ Cartwright v. Cartwright, 1 Phill. 90. So it is said that "mere opinions are the slightest possible evidence." Doughty v. Doughty, 8 Halst. Ch. 641.

² Stackhouse v. Horton, 2 McCart. 202. And see Sloan v. Maxwell, 2 Green Ch. 563; Whitenack v. Stryker, 1 Green Ch. 9; Brown v. Molliston, 3 Whart. 129; Clarke v. Sawyer, 3 Sandf. Ch. 251; Kinne v. Kinne, 9 Conn. 102; Beverly v. Walden, 20 Gratt. 147.

^{*} Alexander's Will, 12 C. E. Green, 463.

⁴ Severin v. Zack, 55 Iowa, 28.

⁵ Cannady v. Lynch, 27 Minn. 435.

be permitted to give his opinion as founded upon facts proved by other witnesses, nor upon an hypothetical case put by counsel. And it is held that a witness cannot be permitted to testify that a person was deranged or insane, nor that her insanity became worse because of the conduct of her husband, these not being statements of facts, but mere conclusions or deductions from facts. No precise rule is laid down as to the length or character of the acquaintance with the party alleged insane which would render the opinion of a witness admissible; but it is held that the opinions of witnesses as to what is undue and unnatural excitement in time of battle cannot generally afford safe grounds for conclusions as to the person's mental condition years afterward, unless it appears that the excitement completely mastered the intellect and deprived the person of accountability.

§ 246. The opinion of a witness as to the sanity of a party must, in order to be competent evidence, be his opinion as it exists at the time of his examination, and on his direct examination his opinion at an anterior period cannot be called for. So in an action for the breach of a bond to keep the peace it was held incompetent to ask a witness what was his opinion of the defendant's mental condition several weeks before the act which was the ground of the suit. But the fact that the witness did not form his opinion at the time he observed the facts on which it is based, but afterwards, will not render the opinion inadmissible. In a capital case it was held, under the general rule excluding hearsay evidence, that testimony to show that the murdered person had expressed an opinion that the defendant was insane was inadmissible.

§ 247. In New York, while the opinions of non-professional

- ¹ Morse v. Crawford, 17 Vt. 499.
- ² State v. Klinger, 46 Mo. 224; Dunham's Appeal, 27 Conn. 192.
- ⁸ Gregory v. Walker, 38 Ala. 26.
- 4 Powell v. The State, 25 Ala. 21.
- Cooley, C. J., in People v. Garbutt, 17 Mich. 10.
- Runyan v. Price, 15 Ohio St. 1.
- ⁵ State v. Geddis, 42 Iowa, 264.
- * Hathaway v. Nat. Life Ins. Co., 48 Vt. 835.
- State v. Spencer, 1 Zab. 196.

witnesses upon the question of insanity are deemed admissible, it is held in a leading case that the examination of such witnesses must be limited so as to elicit their conclusions as to the quality of the specific acts to which they depose, and that they cannot be permitted to express opinions on the general question whether the mind of the party was sound or unsound, or upon his capacity to do the particular act the quality of which is in controversy. The same rule has been adopted elsewhere, and it would seem clearly to be sound, as resting upon the principle that witnesses shall not be permitted to express opinions upon the specific issue to the trial of which they are called.

§ 248. In Massachusetts the courts have, upon the issue of insanity, uniformly refused to admit in evidence opinions of witnesses other than subscribing witnesses to wills as to the mental condition of the party, upon the ground that such cases do not constitute an exception to the general rule of

- There seems to have been formerly some question in New York as to whether opinions upon the question of sanity were to any extent or for any purpose admissible. See Sears v. Shafer, 1 Barb. 408; De Witt v. Barley, 9 N. Y. 371 (explained in Same v. Same, 17 N. Y. 340); People v. Lake, 12 N. Y. 358. But the cases cited below have settled the rule to be as stated in the text.
- ² Clapp v. Fullerton, 34 N. Y. 190 (approved in O'Brien v. The People, 36 N. Y. 276).
- * Hewlett v. Wood, 55 N. Y. 634; Dewitt v. Barley, 17 N. Y. 340; Sisson v. Conger, 1 Thomps. & Cook, 564; Goodell v. Harrington, 3 Thomps. & Cook, 345; Real r. The People, 55 Barb. 551; Howell v. Taylor, 11 Hun, 214; Arnold's Will, 14 Hun, 525.
- 4 Gibson v. Gibson, 9 Yerger, 829; Porter v. Campbell, 2 Baxt. 81; Wisener v. Maupin, id. 342; Clary v. Clary, 2 Ired. 78. The limitation of the admission of opinions recognized in the cases cited seems to have been frequently lost sight of in the expressions by the courts upon this subject. And in Wogan v. Small, 11 S. & R. 141, it was held distinctly that upon an issue of devisavit vel non a witness might be asked whether from his actual knowledge of the alleged testator he considered him fit or unfit to make a will. But it is to be noted that the question was objected to only on the ground that it was leading, not as incompetent in its substance. In Wilkinson v. Pearson, 23 Penn. St. 117, it was held that a witness might be asked whether from the general appearance of the grantor at the time of the execution of the deed he considered him capable of making a contract or of transacting important business.

evidence which excludes the opinions of witnesses upon subjects on which they have no special scientific or technical knowledge. In a case where the issue was upon the testamentary capacity of the party the court say: "The rules which govern this case are so well settled in this commonwealth by judicial decision that it is unnecessary to consider the numerous and conflicting decisions in other states." 1 And they add, in the same case: "Evidence in probate cases in this commonwealth is regulated by the common law, which has not adopted the looser practice, derived from the civil law, of the English ecclesiastical courts on this subject." 2 The rule laid down in Massachusetts upon this subject is adopted in Maine.8 But in a case occurring in the latter state, where the capacity of a testator was in issue, witnesses other than the subscribing witnesses having been called by the contestant to testify to facts showing incapacity, and their testimony having been impeached by proof of their declarations at other times that, in their opinion, the testator was sane; it was held that these opinions might be considered with the other evidence in chief as tending to prove capacity.4

§ 249. The question whether the opinions of witnesses, other than experts or subscribing witnesses to a will, are ad-

¹ Hastings v. Rider, 99 Mass. 622; and see Townsend v. Pepperell, id. 40; Phelps v. Hartwell, 1 Mass. 71; Poole v. Richardson, 8 Mass. 330; Needham v. Ide, 5 Pick. 510; Commonwealth v. Wilson, 1 Gray, 337; Commonwealth v. Fairbanks, 2 Allen, 511.

² Citing Wright v. Tatham, 5 Cl. & Fin. 670. The opinion in this case does not justify its use as authority for the statement that the English courts of common law have not, in the matter of the admission of the opinions of witnesses as to mental condition, adopted the practice of the ecclesiastical courts. Coleridge, J., says: "I do not indeed concede, though it is not perhaps necessary now to decide the point, that the mere opinion of a witness, even upon oath, is, as such, admissible evidence upon a question of competency." It is to be observed that this dictum goes no further than to hold that the opinions of witnesses, when unsupported by a statement of the facts and circumstances on which such opinions are based, are inadmissible,—a rule which is everywhere admitted. See § 249.

^{*} Wyman v. Gould, 47 Maine, 159; and see Heald v. Thing, 45 Maine, 892.

⁴ Ware v. Ware, 8 Maine, 42.

missible as evidence of the mental condition of a party does not appear to have been settled by a decisive adjudication in the English courts. In the ecclesiastical courts the widest latitude is given for the admission of such opinions, and an examination of the English practice seems to justify the conclusion that in all the courts, civil and criminal, as well as in the ecclesiastical courts, the practice concerning proof of mental condition is the same, and permits all who have had means of observation to certify concerning the existence and measure of capacity of a party with reference to the matter in controversy.1 But in every case the witnesses who speak from their own observation are expected to describe as well as they can what has led to their conclusions, as well as their means of observation. In Tatham v. Wright,2 which was a case (in chancery) involving the testamentary capacity of a party, and heard before Brougham, C., Lyndhurst, C. B., and Tindal, C. J., witnesses other than the subscribing witnesses were allowed to express opinions as to the testator's capacity. Upon the same issue heard in the Court of King's Bench, between the same parties in a different form of action, and carried on appeal to the House of Lords, the same witnesses testified in the same manner. Certain letters sent to the testator were offered in evidence as tending to show the opinion of his capacity entertained by the writers, and, although these were rejected, the rejection was based upon the ground that the evidence afforded by them was in the nature of hearsay, consisting, as it did, of statements not made under oath, nor subject to the test of cross-examination. Such opinions, when stated under oath, were said by Alderson, B., to be not properly mere opinion, but a compendious way of reaching the fact; and Parke, B., said that "though the opinion of a witness under oath . . . might be asked, it would only be a compendious mode of ascertaining the result of the

¹ See Beaubien v. Cicotte, 12 Mich. 459. The limitation of the inquiry to the question of the general mental condition of the party, as distinguished from that of his capacity to do the specific act in controversy (see § 247), does not appear to have been stated distinctly in any English case.

² Tatham v. Wright, 1 Russ. & M. 1.

actual observation." In these cases the practice of receiving the opinions of ordinary witnesses as evidence bearing upon the question of capacity seems to have been recognized as being sound and proper. The same practice appears to obtain without question in the English criminal courts.²

SECTION XI.

OPINIONS OF EXPERT WITNESSES.

- § 250. Persons who appear to be properly qualified to testify as experts upon the subject of insanity in the courts of law may give their opinions as to the mental condition of a party in cases where the issue of his insanity is involved. Such opinions may be founded, first, upon facts, symptoms, and circumstances bearing upon the substance of the issue, and observed by the expert witness himself; or, second, upon the testimony of other witnesses, detailing such facts, symptoms, or circumstances, and given in his hearing, or stated to him in proper form by the interrogating party.⁸
- § 251. When an expert witness depends for the grounds of his opinion upon facts observed by himself, the rule admitting his testimony appears to rest on a like principle to that upon which the testimony of witnesses, not experts, upon the same question is admitted; since in most jurisdictions, as already stated, the opinions of non-professional witnesses upon the question of sanity are admitted in evidence, when based upon a sufficient knowledge of facts and circumstances.⁴ And those courts which hold that the opinions of non-professional witnesses (except subscribing witnesses to wills) are inadmis-
- ¹ Wright v. Tatham, 1 Ad. & El. 3; 5 Cl. & Fin. 670. But see the obiter dictum of Coleridge, J., in the same case, cited ante, § 248, note.
- See, among other cases, Regina v. Oxford, 9 C. & P. 525; Rex v. Dyson, 7 C. & P. 305; Rex v. Jones, 1 Leach C. C. 120; 1 Hale P. C. 35. In Dunham's Appeal, 27 Conn. 192, 198, it is said that the rule admitting the opinions of ordinary witnesses does not prevail in the English courts of common law; but this statement is unsupported by authority. See § 248, ante, note.
- Boardman v. Woodman, 47 N. H. 120; Commonwealth v. Rogers, 7 Met. 500.
 - 4 See § 240, ante.

sible, admit in evidence the opinions of expert witnesses as an exception to the general rule. An expert will not be allowed to express an opinion based on facts not stated to the jury by himself or other witnesses.

§ 252. It was observed by Shaw, C. J., in the leading case of Commonwealth v. Rogers, that "the rule of law on which this proof of the opinion of witnesses who know nothing of the actual facts of the case is founded is not peculiar to medical testimony, but is a general rule applicable to all cases, where the question is one depending on skill or science in any particular department. In general, it is the opinion of the jury which is to govern, and this is to be formed upon the proof of facts laid before them. But some questions lie beyond the scope of the observation and experience of men in general, but are quite within the observation and experience of those whose peculiar pursuits and profession have brought that class of facts frequently and habitually under their consideration. . . . It is upon this ground that the opinions of witnesses who have long been conversant with insanity in its various forms, and who have had the care and superintendence of insane persons, are received as competent evidence, even though they have not had opportunity to examine the particular patient, and observe the symptoms and indications of disease at the time of its supposed existence. It is designed to aid the judgment of the jury, in regard to the influence and effect of certain facts, which lie out of the observation and experience of persons in general. . . . But the opinion of a man of small experience, or of one who has crude and visionary notions, or who has some favorite theory to support, is entitled to very little consideration.

¹ See § 248, ante.

^{*} Van Deusen v. Newcomer, 40 Mich. 90. In Carmichael, in re, 36 Ala. 514, it was held that a physician who has formed "no settled opinion as to depth of mind" may be asked whether he discovered any evidence of unsoundness of mind, and may state his opinion on the question of insanity vel non. In Dejarnette v. The Commonwealth, 75 Va. 867, it was held competent to ask a medical expert this question: "Suppose a man had inherited a predisposition to insanity, would great mental anxiety, loss of property, or the honor of one's family, and losses of other kinds, be likely to develop the disease?"

⁸ Commonwealth v. Rogers, 7 Met. 500.

§ 253. Concerning the weight to be given to the opinions of experts upon the subject of insanity, it may be further observed that their conclusions are not to be permitted to control facts clearly appearing in evidence. In a leading English case Dr. Lushington observes: "The judges of the Prerogative Court, where questions of insanity are so frequently mooted, have always held that the most important evidence where medical persons have been examined is the facts to which they depose, rather than the opinions they have formed; that court holding it more proper to draw its conclusions from facts than from the inferences of others, however skilled in cases of insanity." It has been held in an American criminal case that the opinions of medical experts upon the subject of insanity are to be received with peculiar caution, for the reason that, while an expert in exact sciences or in mechanics has tangible or ascertainable facts whereon to base his opinion, those scientists who profess to understand the quality or emotions of the human mind have, in great part, to rely upon mere conjectures for their inductions, which inductions are often warped, or fitted to pet theories or prejudices.² So, in an English capital case at nisi prius, there was no evidence of the defendant's insanity previous to the homicide, and all the evidence of it was that of medical experts who had seen him

¹ Prinsep v. Dyce Sombre, 10 Moo. P. C. 232. In Stackhouse v. Horton, 2 McCart. 202, it is said that in questions of testamentary capacity the abstract opinion of a witness, medical or of any other profession, is of no importance. And it is said that, though the opinions of medical men are entitled to more weight on the trial of a cause involving the question of sanity than those of men who are not physicians, yet it is the duty of the jury to weigh the whole evidence, and if satisfied that testator was sane they should so find, although the medical men examined were of a different opinion. Watson v. Anderson, 13 Ala. 202. See also McAllister v. The State, 17 Ala. 434; Slais v. Slais, 9 Mo. App. 96; Francke v. His Wife, 29 La. Ann. 302; Pannell v. The Commonwealth, 86 Penn. St. 260; Doughty v. Doughty, 3 Halst. Ch. 643; People v. Finley, 38 Mich. 482. In the latter case the court observe: "Unfortunately for the administration of justice, persons are found who, with small experience and large conceit, have succeeded in formulating theories under which, if properly applied, there would be hardly enough sane persons found to sit on juries or attend to business."

² People v. Lake, 12 N. Y. 358.

since the act. Their opinion was that his insanity was chronic, and that he was insane at the time of the act, because he was insane at the trial; but all the circumstances showing great premeditation, preparation, and design, especially with a view to disguise and escape, and the subsequent conduct of the accused evincing a consciousness that he had broken the law and incurred a capital penalty, Mellor, J., left all the circumstances in the case to the jury, with a strong direction that, if they were satisfied that the prisoner knew the nature of his act, and now understood the nature of the proceedings, they should find him guilty.¹

(a.) Opinions limited to Matters of Fact.

§ 254. In conformity with the rule already stated in regard to the testimony of witnesses not experts,2 so, in regard to expert witnesses, the better rule would seem to be that such witnesses cannot be permitted to express opinions upon the question of the party's sanity as affecting the quality of the act in controversy. In an English case it was doubted if an expert witness could be asked whether, upon the testimony adduced in the case, the act in controversy was an insane act, since this was the very point to be decided by the jury.8 Later, in a capital case, upon a medical witness saying that he did not consider the prisoner responsible for her acts, the court said: "We do not want your opinion as to her responsibility. Simply give your opinion as a skilled witness, from what you know of the prisoner and from the evidence you have heard, of her state of mind." 4 This rule has been more strongly expressed in New York, where it was held that even where an expert witness has heard all the testimony, his

¹ Regina v. Southey, 4 F. & F. 864.

² See § 241, ante.

⁸ Rex v. Wright, Russ. & Ry. 456 (1821).

⁴ Regina v. Richards, 1 F. & F. 87. In Fairchild v. Bascomb, 35 Vt. 898, the court held that it was not proper to inquire of a medical expert whether a testator possessed sufficient mental capacity to transact business, or to make a will, but that the questions should be so framed as to require the witness to state generally the degree of testator's capacity or intelligence.

opinion founded thereon, upon the general question of sanity or insanity, is not competent evidence; and, further, that he should merely give an opinion as to what the facts proved, or claimed to be proved, indicate as the mental condition of the party.¹

§ 255. In Michigan, however, it has been said that although "no witness shall usurp the functions of the jury, or even give an opinion upon the weight or credibility of the testimony," yet an expert witness called upon to testify upon the question of insanity is allowed to state his opinions as inferences of fact, "notwithstanding that in doing this he gives his opinion upon the existence or non-existence of the same resultant fact or facts which the jury are to find by their verdict (though some authorities require the questions to be so framed as to avoid even this result)." So in Ohio it has been held that a physician who had, on direct examination, stated his opinion that the prisoner was insane might, on crossexamination, be asked whether, in his opinion, the prisoner knew the difference between right and wrong.

¹ People v. Lake, 12 N. Y. 358; and see People v. Thurston, 2 Parker Cr. 49; Sanchez v. The People, 22 N. Y. 147; Arnold's Will, 14 Hun, 525; Hagadorn v. Conn. Mut. Life Ins. Co., 22 Hun, 249. In Koenig v. Globe Mut. Life Ins. Co., 10 Hun, 558, the family physician of the deceased party was allowed to answer this question: "From your experience and reading, and from your acquaintance with the mental condition of deceased, what effect if any would you say this disease (melancholia) would have upon her as to her power to control her actions or to resist any impulse with which she might be seized?" "In this case, how do you think it was?" The case is distinguished from Van Zandt v. Mut. Ben. L. Ins. Co., 55 N. Y. 169, where it was held error to permit this question to be asked of an expert witness: "Assuming that a person had that form of insanity which you denominate melancholia, and had committed suicide, would you attribute that suicide to the disease?" since the question called for no information peculiarly within the knowledge of an expert, but for an inference which was within the province of the jury to draw, without being influenced by the opinion of the witness.

² Kempsey v. McGinnis, 21 Mich. 123.

^{*} Clark v. The State, 12 Ohio, 483.

(b.) Qualification of Experts.

§ 256. Since it is a rule of law that the question of the competency of witnesses to testify as experts is to be decided in each particular case by the court in the exercise of its best discretion, it follows that no rule can be laid down strictly defining the qualifications of experts in cases where the issue is upon the sanity of the party; and differing expressions of opinion upon this subject appear in the reported cases. Thus in Massachusetts, where opinions of ordinary witnesses are held inadmissible upon the question of sanity, although accompanied by a statement of the facts on which such opinions are founded, it has nevertheless been held, upon an issue of testamentary capacity, that opinions of physicians who attended the testator during the sickness in which he executed the will are admissible in evidence as to his capacity to make a will immediately before and after its actual execution, when accompanied by a statement of the symptoms and appearances on which such opinions were based, although the witnesses were not the family physicians of the testator, nor had made a special study of mental disease. But in another case occurring in the same state it was held that a physician who had not made the subject of mental disease a special study, but who, when his patients required medical treatment by reason of their insanity, had been accustomed to call in the services of another physician who had made the subject a special study, or to recommend the removal of the patient to a hospital for the insane; was not competent to testify as an expert upon a hypothetical case put to him.2

¹ Hastings v. Rider, 99 Mass. 622; and see also Baxter v. Abbott, 7 Gray, 71. In Hathorn v. King, 8 Mass. 371, it was held that physicians who had been present at the execution of a will might be asked whether, from the circumstances surrounding the patient, and the symptoms they observed, they could form an opinion of the soundness of the testator's mind; and, if so, whether they thence concluded that his mind was sound or unsound. But in either case it was said they must state the circumstances or symptoms from which their conclusions were drawn.

² Commonwealth v. Rich, 14 Gray, 335. See Commonwealth v. Fairbanks, 2 Allen, 511. In Hastings v. Rider, ubi supra, the court distinguished the case from that of Commonwealth v. Rich, ubi supra, which

§ 257. In Mississippi it is held that, in order to qualify a witness to testify as an expert upon the question of insanity in answer to hypothetical interrogatories as to supposed facts of which he has no personal knowledge, he must be, or profess to be, an expert on the general subject of insanity; that no acquaintance with cognate pursuits will suffice to render him competent, and that the general practice of a country physician for twenty years would not qualify him to testify as an expert. On the other hand, it is said in Vermont that physicians and surgeons are experts on the subject of insanity, even although they have not made the subject a special study; 2 and the same view is adopted in Kansas.8 In Indiana it is held that physicians who are engaged in practice, and who have given the subject of medical jurisprudence some attention by reading and by attending lectures, may be examined as experts on the subject of insanity.4

(c.) Foundation of Expert's Opinion.

§ 258. It is a rule sanctioned by the weight of authority that when the opinion of an expert witness upon the question of sanity is based, not on a hypothetical case stated, nor upon the testimony of other witnesses, but upon facts, symptoms, and circumstances that have come under his own observation as an attending physician of the party or otherwise, such facts, symptoms, or circumstances must, as in the case of a witness not an expert called to express an opinion upon the same sub-

was a trial at nisi prius, in that, in the latter case, the witness proffered as an expert "was allowed, without objection, to testify to his opinion of the defendant's mental condition from personal observation, and was only restrained from giving an opinion as to his sanity or insanity upon a hypothetical case stated."

- ¹ Russell v. The State, 53 Miss. 367.
- ² Hathaway v. Nat. Life Ins. Co., 48 Vt. 335; Fairchild v. Bascomb, 35 Vt. 398. The court, in the latter case, appear to consider nurses accustomed to attend the sick experts in respect to the mental capacity of sick persons.
- * State v. Reddick, 7 Kan. 143. See also Bitner v. Bitner, 65 Penn. St. 347; Pigg v. The State, 43 Tex. 108.
- ⁴ Davis v. The State, 35 Ind. 496; and see Coryell v. Stone, 62 Ind. 307.

ject, be fully stated by the testifying witness; and the jury must be left to determine whether the facts, as well as the opinions, are true or false. But in a leading case in Georgia it appears to have been held, upon the issue of testamentary capacity, that the opinions of physicians, like those of the attesting witnesses to the will, were admissible without any statement of the grounds upon which such opinions were founded.²

§ 259. In conformity to the general rule which forbids the admission of hearsay testimony, an expert witness cannot be allowed, on the issue of sanity, to give an opinion based upon declarations or representations of other parties made coram non judice. Thus where the insanity of a defendant was relied on to avoid an alleged sale of property by him, a physician who, a short time before the sale, had visited the defendant in consultation with his attendant physician was not permitted to give in evidence the declarations made at that time by the defendant's wife, physician, and attendants as to the previous symptoms or condition of the defendant. was the witness allowed to give his opinion of the mental condition of the defendant at the time of his visit, founded upon the representations thus made to him, though taken in connection with symptoms which he discovered by personal observation and examination. It was said that his opinion should be formed entirely from his own observation and examination of the patient's symptoms and condition.8

§ 260. By an application of the same rule written declara-

White v. Bailey, 10 Mich. 155; Kempsey v. McGinnis, 21 Mich. 128; Hathorn v. King, 8 Mass. 371; Dickinson v. Barber, 9 Mass. 227; Hastings v. Rider, 99 Mass. 622; Gibson v. Gibson, 9 Yerg. 329; Puryear v. Reese, 6 Cold. 21; Clark v. The State, 12 Ohio, 483; Chandler v. Barrett, 21 La. Ann. 58.

² Potts v. House, 6 Ga. 324, 335; and see Clarke v. Sawyer, 3 Sandf. Ch. 351.

^{*} Heald v. Thing, 45 Maine, 392. See also Wood v. Sawyer, Phillips (N. C.), 251; Watson's Interdiction, 81 La. Ann. 759. In Commonwealth v. Pomeroy, 117 Mass. 143, an expert witness called by the prosecution testified that he had given the prosecutor a written opinion on the question of the defendant's sanity. The defence called for this, and offered it in evidence. The court refused to admit it, as such, but the defendant was permitted to use it on the cross-examination of the witness.

tions or opinions of medical men previously made are generally inadmissible in evidence.¹ But if these are in the nature of official records, or certificates, required by law to be made, they are admissible, though not conclusive, as evidence.² Thus a record of the condition and treatment of a patient in a hospital, produced at trial, forty years after its date, by the superintendent of the hospital, as part of a series of records of which he is the official custodian, purporting to be contemporaneously made by the attending physicians of all the cases there treated, and which it was their duty to make, was held to be admissible in evidence as the foundation for the opinion of an expert upon the mental condition of the party in regard to whom the record was made, and this without identifying the person who made it.³

§ 261. It is held that unsoundness of mind can only be predicated upon some actual manifestation or development of irrationality; and so while the diseased condition of the body, as indicated by an autopsy, may be some evidence to corroborate testimony of actual manifestations of mental alienation, and to account therefor, it should not be received in the absence of some proof of the decedent's irrational conduct. The court add, that in any event the opinion of an expert of the probability of a mental derangement deduced from an autopsy would be overcome, as proof of the mental condition of the decedent, by the testimony of one competent observer of the appearance, conversation, conduct, and characteristics of the decedent for a series of years, in his domestic, social, and business relations.4 And in a case occurring in Georgia the court refused to permit an expert witness to explain to the jury "the structure of the brain, what changes were produced upon it by bodily disease, and how its irritation and inflammation were calculated to present to the mind unreal

¹ Martin v. Johnston, 1 F. & F. 122.

Lovatt v. Tribe, 3 F. & F. 9. But a medical certificate of a person's insanity, required to be made as a prerequisite to his restraint in a lunatic asylum, is conclusive in behalf of the person holding him in confinement as a justification of such confinement. Norris v. Seed, 3 Exch. 782.

Townsend v. Pepperell, 99 Mass. 480.

⁴ Le Bau r. Vanderbilt, 3 Redf. 384.

images upon which a person with a diseased brain might be induced to act as though they were real existences." 1

(d.) Hypothesis to be stated.

§ 262. When the facts upon which an expert witness is to depend for the grounds of his opinion are derived from the testimony of other witnesses in the case, the expert witness cannot be permitted to give an opinion as to the condition of the party's mind based upon the evidence of the other witnesses, since this would be to permit him to assume the functions of the jury and to decide, first, upon the credibility of the evidence in the case, and, second, upon the value and efficacy of the facts and circumstances which he assumes to be proved upon the question of soundness of mind. But the expert witness should be asked his opinion upon a state of facts put in the form of an hypothesis and based upon the evidence appearing in the case.²

- ¹ Anderson v. The State, 42 Ga. 9.
- ² Woodbury v. Obear, 7 Gray, 467 (opinion by Shaw, C. J.); Negroes v. Townsend, 9 Md. 145; Boardman v. Woodman, 47 N. H. 120; Regina v. Frances, 4 Cox C. C. 57; Doe v. Bainbrigge, id. 454; Fairchild v. Bascomb, 35 Vt. 398. In the Answers of the Judges in McNaghten's Case, 10 C. & F. 200 (see 1 C. & K. 30, n.), it was said that, where a defendant in a criminal case is supposed to be insane, a medical man who has been present in court and heard the evidence may be asked as a matter of science whether the facts stated by the witnesses, supposing them to be true, show a state of mind incapable of distinguishing between right and wrong. And see Rex v. Wright, Russ. & R. 456, and Rex v. Searle, 1 Moo. & R. 75, in which cases it was held that a witness of medical skill might be asked whether certain appearances proved by other witnesses were, in his judgment, symptoms of insanity. But this view of the law is not accepted, and the expression in McNaghten's Case is distinctly overruled in Regina v. Frances and Doe v. Bainbrigge, cited above.

In United States v. McGlue, 1 Curtis C. C. 1, Dexter v. Hall, 15 Wall. 9, and Kempsey v. McGinness, 21 Mich. 123, the rule laid down in the text was not extended beyond those cases in which conflicting evidence upon the question of insanity appears. And in State v. Klinger, 46 Mo. 224, and State v. Windsor, 5 Harr. 512, it was held that an expert might state an opinion based directly upon the facts in the case, when these were undisputed and had been stated in the hearing of the expert. But it would seem that the rule adopted in the latter cases is clearly objectionable as permitting the expert to pronounce an opinion upon the very issue to be decided by the jury.

§ 263. A hypothetical question put to an expert witness for the purpose of obtaining his opinion as to the sanity of a party must be based, not upon the evidence, as such, but upon facts admitted to be proved in the case, or upon facts assumed to be true and of which there is evidence tending to proof. But when the evidence is conflicting, it is held that the hypothesis need not embrace all the facts in evidence;2 and this would seem to be the true rule, since in such cases the expert, in order to form a lucid opinion upon all the facts alleged in the case, would have to reject some of them as untrue, and would thus assume the function of the jury and decide upon the credibility of evidence, which he cannot be permitted to do.⁸ If, however, there be no dispute as to the facts on which the expert is to found his opinion, it seems to be proper to require that the question propounded shall embrace them all.4 It is error to admit in evidence opinions of experts based upon an hypothesis framed wholly or in part on facts of which there is no proof.⁵ The hypothetical question being put, and the opinion of the expert witness given thereon, it will be for the jury to decide whether the supposed facts assumed in the hypothesis correspond with the facts

- ² Ibid.; but see contra, Webb v. The State. 9 Tex. App. 490.
- In Fairchild v. Bascomb, 35 Vt. 398, it was said that, when the facts on one side conflict with the facts on the other, the question should not be framed to incorporate them all, but the attention of the witness should be directed to their opposing tendencies, and if his skill and knowledge can furnish an explanation which will reconcile them he may state it.
- 4 Davis v. The State, 85 Ind. 496. In New York it has been held, in a criminal case, that an expert cannot be permitted to state an opinion on the prisoner's sanity when he has heard only part of the evidence on the subject, and his opinion has been formed on such part of the evidence. People v. Thurston, 2 Parker Cr. 49; People v. Lake, 12 N. Y. 358. But in so far as this rule in these cases conflicts with the statements of the text, it is difficult to reconcile them with the tenor of the authorities.
- ⁵ Hathaway v. Nat. Life Ins. Co., 48 Vt. 835; Ames's Will, 51 Iowa, 597; Fraser v. Jennison, 42 Mich. 206.

¹ Guetig v. The State, 66 Ind. 94 and authorities cited. See also 1 Whart. Cr. Law, § 50 et seq. An opinion "based upon an hypothesis" which is "wholly incorrectly assumed, or incorrect in its material facts to such an extent as to impair the value of the opinion, is of little or no weight." Guetig v. The State, ubi supra.

actually proved in the case; 1 and if the facts assumed are not substantially proved to the satisfaction of the jury, the answer to the hypothetical question is not to be considered by the latter. 2 An expert witness cannot be allowed to give his opinion on facts not stated, as where a physician was asked his opinion of the cause of the patient's mental condition "as he observed it." 8

§ 264. After the direct examination of an expert witness upon the facts assumed in a hypothetical case, the adverse party may cross-examine the witness, either upon the facts assumed in the hypothesis of his opponent or upon an hypothesis framed by himself, or on both hypotheses.⁴ The hypothesis stated to the expert need not be repeated with every question, nor need it be repeated in the re-direct, when it has been stated in the cross, examination.⁶

SECTION XII.

OPINIONS OF SUBSCRIBING WITNESSES TO WILLS.

§ 265. Since the law declares that the proof of wills shall, in the first instance, rest upon the testimony of the subscribing witnesses thereto, it follows that the testimony of these must be taken to be competent upon all matters requisite to be proved in order to establish the will as a valid instrument. So it is held, as an exception to the general rule already stated, that the opinions of the subscribing witnesses to a will upon the question of the testator's mental condition at the time of the factum are admissible in evidence upon the offer of the will for probate, or on an issue of devisavit vel non, although such opinions are not accompanied by a state-

- ² Hovey v. Chase, 52 Maine, 304.
- ⁸ Van Deusen v. Newcomer, 40 Mich. 90.
- 4 Davis v. The State, 35 Ind. 496.
- ⁵ McGinness v. Kempsey, 27 Mich. 363.
- 6 Heyward v. Hazard, 1 Bay, 335.
- 7 See § 241, ante.

¹ McNaghten's Case, 10 Cl. & Fin. 200, 211; Rex v. Searle, 1 M. & Rob. 75; People v. Lake, 12 N. Y. 358; People v. Thurston, 2 Parker Cr. 49.

ment of the facts and premises upon which they are founded.¹ But it is held that, in law, the opinions of subscribing witnesses are entitled to no more weight than those of other witnesses who may testify upon the hearing;² although it may well happen, from the circumstances of the case and the gravity of the duty imposed upon the attesting witnesses, that their opinions will, in fact, be entitled to greater credit than those expressed by the other witnesses.³

§ 266. The attesting witnesses may be cross-examined as to the condition of the testator's mind,⁴ and his testimony may be rebutted;⁵ and it is held that where such a witness declares his belief that the testator was non compos, the party calling him may contradict him by reading his evidence taken on a former trial, or by proof of his declarations at other times.⁶ And when the subscribing witnesses disagree upon the question of the testator's capacity, other proof may be admitted as to that fact;⁷ and a will may be pronounced either valid or invalid, as the case may be, contrary to the testimony of the subscribing witnesses,⁸ though proof in such cases should be very clear.⁹

- ¹ Poole v. Richardson, 3 Mass. 380; Clapp v. Fullerton, 84 N. Y. 190; Robinson v. Adams, 62 Maine, 369; Logan v. McGinniss, 12 Penn. St. 27; Titlow v. Titlow, 40 Penn. St. 483; Pidcock v. Potter, 68 Penn. St. 342; Young v. Barner, 27 Gratt. 96; Lodge v. Lodge, 2 Houst. 418; Potts v. House, 6 Ga. 324; Van Huss v. Rainbolt, 2 Cold. 139; Puryear v. Reese, 6 Cold. 21; Walker v. Walker, 34 Ala. 469; Kelly's Heirs v. McGuire, 15 Ark. 556; Abraham v. Wilkins, 17 Ark. 292; McDaniel v. Crosby, 19 Ark. 533.
- ² Turner v. Chessman, 2 McCart. 243. See Sutton v. Morgan, 8 Stew. 629.
- ⁸ See Kemble v. Church, 3 Hagg. Ecc. 273; Wheeler v. Alderson, id. 574; Brock v. Luckett, 4 How. (Miss.) 459; Allison v. Allison, 7 Dana, 90, 92.
 - 4 2 Greenl. Ev. § 691; Egbert v. Egbert, 78 Penn. St. 326.
 - ⁵ Spencer v. Moore, 4 Call (Va.), 423.
 - ⁶ Harden v. Hays, 9 Penn. St. 151.
- ⁷ Bell v. Clark, 9 Ired. 239; Frear v. Williams, 7 Baxt. 550; Rigg v. Wilton, 13 Ill. 15. But see Walker v. Walker, 2 Scam. (Ill.) 291, which case appears to be unsupported by authority.
 - ⁸ Le Breton v. Fletcher, 2 Hagg. Ecc. 558; Lowe v. Joliffe, 1 Blackst.

Butler v. Benson, 1 Barb. 526; Cowen & Hill's Notes, 1356.

§ 267. It has been held in Pennsylvania that where a will is proved by proving the signature of a deceased subscribing witness, the declarations of such a witness, to the effect that the testator was incompetent, are admissible, since the proof of his signature is prima facie evidence of the testator's competency. But the court in Massachusetts held, on the trial of an appeal from a decree allowing a will, that the fact was incompetent, as evidence to impeach the validity of the will, that one of the attesting witnesses, who had testified upon oath in the probate court to the testator's sanity, and since deceased, had declared that he wished to live to unsay his testimony, and that the testator was in fact insane at the time of the factum. In the same case it was held that the fact of the attestation of a will is no proof, of itself, that the witnesses believed the testator to be sane. The court say: "He [the witness] may have had no opinion on the subject. He may have attested the will with the full belief that the testator was insane, and with the view of testifying to that opinion whenever the will should be offered for pro-No inference as to his opinion can be drawn from the mere act of signing; and therefore evidence of a contradictory opinion expressed by him was inadmissible." 2 In Illinois, under a statute requiring that, in order to the probate of a will, the subscribing witnesses must swear that they believe the testator to have been of sound mind and memory at the time of the factum, such a witness having testified that he did not know whether the testator was of sound mind or not, "that he might have been and might not," it was held that the proof was defective, — that the witness un-

365; Howard's Will, 5 Mon. 199; Sechrest v. Edwards, 4 Met. (Ky.) 163; Griffin v Griffin, R. M. Charlton (Ga.), 217; Perkins v. Perkins, 39 N. H. 163; Butler v. Benson, 1 Barb. 526, 533; Jauncey v. Thorne, 21 Barb. Ch. 40; Peebles v. Case, 2 Bradf. Surr. 226. In Sackvill v. Ayleworth, 1 Vernon, 105 (1682), it was held that a bill would not lie to perpetuate the testimony of the witnesses to a lunatic's will, made before his lunacy, during the lunatic's lifetime. In Tayleur, in re, L. R. 6 Ch. App. 416 (1871), the court, without passing on the question whether such a bill would lie, ordered the costs of the bill to be paid out of the lunatic's estate.

¹ Harden v. Hays, 9 Penn. St. 151.

² Baxter v. Abbott, 7 Gray, 71, 82 (opinion by Thomas, J.).

doubtedly had an opinion, and that this was indispensable to probate.1

§ 268. It is said that by the act of subscribing the will the attesting witness "solemnly attested the capacity of the testatrix, and when he undertakes to invalidate the will his testimony is to be received with suspicion." 2 And it has been held that it is not competent to ask a subscribing witness whether he would have attested the will had he known the dispositions contained in it, for the purpose of proving fraud or imbecility.8 So, under the rule that when subscribing witnesses are dead proof of their handwriting will stand prima facie for proof of the testator's capacity, it was held, where two out of three subscribing witnesses proved the will, and no evidence was produced to prove the handwriting of the third, who was absent from the state, that the declarations of the third witness that the testator was insane could not be received.4 But where one of the subscribing witnesses, deceased since the factum, had stated that the testatrix had. executed a will, and that she was not fit, and was crazy, and that he, the witness, had only attested her signature, and further stated that he had said the same to another of the attesting witnesses, who replied that the testatrix was competent but that he had observed her incoherency, proof of this declaration was held to be admissible, as tending to control the presumption arising from the fact of the witness's attestation.5

¹ Allison v. Allison, 46 Ill. 61.

² Cheatham v. Hatcher, 30 Gratt. 56; and see Kinleside v. Harrison, 2 Phill. 449, 569; and, contra, Baxter v. Abbott, as cited in § 265.

^{*} Spence v. Spence, 4 Watts, 165. But see Baxter v. Abbott, 7 Gray, 71, where it is held that the attestation of a will is no evidence that the witness believed the testator to be sane. See also Huff v. Huff, 41 Ga. 696; Withinton v. Withinton, 7 Mo. 589.

⁴ Fox v. Evans, 3 Yeates, 506.

⁵ Colvin v. Warford, 20 Md. 857.

SECTION XIII.

BOOKS.

- § 269. On the trial of the issue of sanity it is not competent to read to the jury from books of established reputation on the subject of insanity, whether written by medical men or lawyers.¹ The objection to the admission of medical books appears to be that such evidence cannot have the weight of sworn testimony, and that the statements contained in such books have no weight as legal authority.2 In regard to legal works upon the subject, their admission would seem to be in direct contravention of the rule that it is the exclusive province of the court to declare the law, and that the jury are to receive it only from the court.8 Both the objections stated would seem to apply to the reading to the jury reports of decided cases.4 Applying the same principles, it has been held incompetent to read to the jury statistics showing the increase of insanity, as stated by the court or by counsel on the trial of another cause.⁵
- ¹ 1 Greenl. Ev. § 440, note; Commonwealth v. Wilson, 1 Gray, 337; Davis v. The State, 38 Md. 15; Collier v. Simpson, 5 C. & P. 74; Cocks v. Purdrey, 2 C. & K. 270; Regina v. Crouch, 1 Cox C. C. 94; Fraser v. Jennison, 42 Mich. 206.
 - ² State v. West, 1 Houst. Del. Cr. Ca. 371.
- Dunham's Appeal, 44 Conn. 37. But in a later case in Connecticut it was held that reports of decided cases and standard medical works might be read to the jury. See State v. Hoyt, 46 Conn. 330. And medical works have been admitted to be read in Delaware. See State v. West, ubi supra.
 - 4 Dunham's Appeal, ubi supra.
 - ⁵ Commonwealth v. Wilson, ubi supra.

CHAPTER IX.

CAPACITY OF INSANE PERSONS TO DO VALID CIVIL ACTS.

SECTION I.

INSANE PERSONS MAY DO VALID ACTS.

§ 270. THE law recognizes the fact that there may be derangement of mind as to particular subjects, and yet capacity to act on other subjects. It follows that, in order to invalidate a civil act or to excuse an act alleged to be criminal on the ground of the insanity of the doer, it must be shown that the act in question was the direct offspring or result of the insanity alleged; 2 for although it seems to have been once the doctrine of the courts that an insane person could do no legal or binding act,8 it is now to be regarded as a settled rule of law that the mere fact of insanity, without more, does not disable a party to bind himself by any act or contract, nor to exonerate him from responsibility, whether civil or criminal. And the proof which is designed to invalidate a man's act by reason of his insanity must show inability to exercise a reasonable judgment in regard to such act.4

- ¹ Hall v. Unger, 4 Sawyer C. C. 672.
- Dew v. Clark, 8 Add. Ecc. 79; Moffit v. Witherspoon, 10 Ired. 185; Boyce's Adm'r v. Smith, 9 Gratt. 704; Emery v. Hoyt, 46 Ill. 258; Pelamourges v. Clark, 9 Iowa, 1; Lozear v. Shields, 8 C. E. Green, 509; Eaton v. Eaton, 8 Vroom, 113; Hill v. Day, 7 Stewart Eq. 150.
 - * See § 1.
 - ⁴ Concord v. Rumney, 45 N. H. 423.
- "It is not necessary to say that an idiot or lunatic cannot execute a power involving the exercise of discretion, even though it should appear that the donor knew, at the time of the grant of the power, that the donee was non compos mentis." Alexander's Will, 12 C. E. Green, 463. But in the same case it was held that a will, otherwise invalid on account of the testator's incapacity, could not be sustained as the execution of a power which it was contended was vested in the insane testator by the

§ 271. Thus although a person may be the subject of an insane delusion, he is not on that account incompetent to make a will, unless it appear that the delusion was such as would naturally influence the mind of a testator, as being, for example, in regard to the extent and character of his property or his relations with the persons who naturally would become the objects of his bounty. So a deed cannot be impeached on the ground that the grantor was a monomaniac, when his monomania did not extend to the subject out of which the conveyance grew nor affect his business capacity.2 And in a case of a suicide committed by one assured in a life insurance policy which provided that the policy should become void if the assured should die by his own hand, where it appeared that the assured understood the nature of his act and intended to take his own life, it was held that the suicide was a sane act and avoided the policy, although the assured was admitted to be insane upon some subjects.8 Where the question at issue was whether, at a certain time, a person was so insane as to be unable to choose a settlement, it was held that the jury were to consider whether, if his mind was diseased, it was diseased to such an extent as to deprive him of volition, free-will, and power of choice to such a degree as to destroy his control over his mind and himself so that he would be unable to make an intelligent choice of a settlement.4 In another case Wilde, J., said: "If it were admitted that idiots and persons

will of his father devising him certain estates with power of testamentary disposition.

¹ Dew v. Clark, 3 Add. Ecc. 79; Benoist v. Murrin, 58 Mo. 304; Wetter v. Habersham, 60 Ga. 194; Cole's Will, 49 Wis. 179; Kingsbury v. Whittaker, 32 La. Ann. 1055; Leech v. Leech, 5 Clark (Penn.), 86. See ch. xi. sec. i. and cases cited.

² Burgess v. Pollock, 53 Iowa, 273; Nottingham, ex parte, 1 Ala. 400; Ekin v. McCracken, 32 Leg. Int. 405. See ch. xii. sec. i., post, and cases cited.

⁸ Dean v. American Mut. Life Ins. Co., 4 Allen, 96.

⁴ Townsend v. Pepperell, 99 Mass. 40. So in Concord v. Rumney, 45 N. H. 423, it was held that a woman insane at the time of her marriage, and afterwards, and whose marriage had been decreed null for that cause, might gain a settlement by her residence in the house of her husband, if she had sufficient intellect to choose a home.

wholly bereft of understanding are incapable of changing their domicile, it would not follow that the same incapacity would attach to all degrees of mental imbecility. There are those, and those not a few, who may be unable to manage their property and other concerns with good judgment and discretion, and may need guardians to protect them from imposition, and who, nevertheless, have sufficient understanding to choose their homes."1

§ 272. The application of this rule to cases in which insanity is alleged as an excuse for an act prima facie criminal will be found more fully considered hereafter.² It is sufficient here to state that in such cases it must appear not only that the mind of the accused was insane, but that the act for the commission of which he is indicted was the direct offspring of such insanity, and that the defendant is not to be relieved from responsibility unless both these facts be proved.³

(a.) Contrary Authorities.

§ 273. Although the rule that an act sought to be invalidated by reason of the doer's insanity must be the direct offspring and result of such insanity is now universally accepted, a different rule has been laid down in several English cases, which, though now overruled, are of sufficient importance to be noted. In Groom v. Thomas it was said that, in civil suits, it is not necessary to trace or connect the morbid imagination with the act itself. "If the mind is unsound the act is void. The law avoids every act of the

¹ Holyoke v. Haskins, 5 Pick. 20. See ch. x. sec. vii. and cases cited. The general rule stated seems to have found an extreme application in the case of Jenkins v. Morris, L. R. 14 Ch. D. 674 (1880). In this case a lease was sustained as against a lessor who at the time of the execution of the lease was possessed with the delusion that the leased land was so impregnated with sulphur as greatly to diminish its value, and who afterwards instituted proceedings to have the lease set aside. See also Gillespie v. Shuliberrier, 5 Jones (N. C.), 157.

² See ch. xiii.

^{*} State v. Stickley, 41 Iowa, 232; and see, to the same effect, State v. Felter, 32 Iowa, 49; State v. Geddis, 42 Iowa, 264.

⁴ 2 Hagg. Ecc. 433 (1829).

lunatic during the period of lunacy, although the act to be avoided cannot be connected with the influence of the insanity, and may be proper in itself." Later, in Waring v. Waring, Lord Brougham, in an elaborate opinion, laid down a rule which is thus summarized: "If the mind is unsound on one subject, providing that unsoundness is at all times existing upon that subject, it is erroneous to suppose such a mind is really sound on other subjects; it is only sound in appearance; for if the subject of the delusion be presented to it, the unsoundness would be manifested by such a person believing in the suggestions of fancy as if they were realities; any act, therefore, done by such a person, however apparently rational that act may appear to be, is void, as it is the act of a morbid or unsound mind." This rule, which, if adopted, would substantially revolutionize the law upon the subject of insanity, seems to have been applied in a suit for nullity of marriage on the ground of the insanity of one of the parties. The court say: "The court has not here, as in many testamentary cases, to deal with varieties and degrees in strength of mind, with the more or less failing condition of intellectual power in the prostration of illness, or the decay of faculties in advanced age. The question here is one of health or disease of mind, and if the proof shows that the mind was diseased, the court has no means of gauging the extent of the derangement consequent upon that disease, or affirming the limits within which the disease might operate to obscure or divert the mental power."2 In Smith v. Teb-

¹ 6 Moo. P. C. C. 341 (1848).

Hancock v. Peaty, L. R. 1 P. & D. 335. In this case the court further said: "It may surely be added that if any contract more than another is capable of being invalidated on the ground of the insanity of either of the contracting parties, it should be the contract of marriage; an act by which the parties bind their property and their persons for the rest of their lives." The case arose upon the alleged lunatic's own suit for nullity of marriage. The facts showed the existence of many and gross delusions in the mind of the petitioner both prior and subsequent to her marriage with the respondent. It does not appear whether the manifestations of insanity on the part of the petitioner before her marriage were known to the respondent, and the court does not intimate any opinion upon the question whether, had the husband been deceived as to the mental condition of his wife before marriage, a decree of nullity would have been

betts, Sir P. J. Wilde said: "I conceive the decided cases to have established this proposition: that if disease be once shown to exist in the mind of the testator, it matters not that the disease be discoverable only when the mind is addressed to a certain subject, to the exclusion of all others, the testator must be pronounced incapable. Further, that the same result follows, though the particular subjects upon which the disease is manifested have no connection whatever with the testamentary disposition before the court. . . . A person who is affected by monomania, although sensible or prudent on subjects and occasions other than those upon which his infirmity is commonly displayed, is not in law capable of making a will." In this case a number of English cases are cited in support of the rule as stated, none of which, except that of Waring v. Waring, tend in the slightest degree to establish the propositions laid down.

§ 274. The rule sought to be established in the above cases has not been countenanced in the American courts, and the doctrine of Waring v. Waring has been repeatedly overruled.² pronounced in his favor upon his own petition. Upon the whole case it appears to be doubtful whether the court intended to adopt to its full extent the principle laid down in Waring v. Waring, or to limit the application of that principle to contracts of marriage entered into between a sane and an insane party. See ch. x. sec. vi., post.

- ¹ L. R. 1 P. & D. 398.
- ² Boardman v. Woodman, 47 N. H. 120; Dennett v. Dennett, 48 N. H. 531; Pidcock v. Potter, 68 Penn. St. 342; Frazer v. Jennison, 42 Mich. 206; Benoist v. Murrin, 58 Mo. 304; Denson v. Beasley, 34 Tex. 191.

The following obiter dictum appears in McElroy's Case, 6 W. & S. 451 (1843): "In civil cases, where a person does an act or makes a contract, and labors under partial insanity at the time, it invalidates the act though the act have no connection with the delusion which constitutes the partial insanity;" and dicta apparently to the same effect occur in Bensell v. Chancellor, 5 Whart. 371; Cook v. Parker, 4 Phil. 265; McDonald v. McDonald, 14 Grant's Ch. 545. But see the latter case on appeal, 16 Grant's Ch. 37; Beals v. See, 10 Penn. St. 56; Pidcock v. Potter, ubi supra; Lancaster Co. N. Bank v. Moore, 78 Penn. St. 407.

In Pelamourges v. Clark, 9 Iowa, 1, a request for instruction below that "monomania or partial insanity will not avoid a will, unless it be shown that the will was the direct offspring of such partial insanity," was refused, and the refusal was held right on appeal. No reasons are stated or authorities cited by the court in support of its opinion. See also certain dicta contained in Alston v. Boyd, 6 Humph. (Tenn.) 504.

Nor is the doctrine of Waring v. Waring and the other cases cited supra now accepted as law in England. In Smee v. Smee 1 it is said: "A few years ago it was generally considered that if a man's mind were unsound, in one particular, the mind being one and indivisible, his mind was altogether unsound, and therefore that he could not be held capable of performing rationally such an act as the making of a will. A different doctrine subsequently prevailed, and this I propose to enunciate for your guidance. It is this. If the delusions could not reasonably be conceived to have had anything to do with the deceased's power of considering the claims of his relations upon him and the manner in which he acted, then the presence of a particular delusion would not incapacitate him from making a will. . . . You [the jury] have to say whether . . . the flaw . . . in the testator's mind was . . . such . . . that though its effect may not be seen upon the surface of the document . . . it had an effect upon him when . . . making the bequest to the corporation of Brighton." Later, in Jenkins v. Morris,2 which was a suit to avoid a lease on account of a certain delusion existing in the mind of the grantor, Hall, V. C., in delivering judgment, said: "In the argument it was contended that, delusions being once shown to exist, a contract was void, unless it were shown (the onus being on the party insisting on the contract) that the delusions had ceased. I was referred to" Waring v. Waring and Smith v. Tebbitts. "I do not hesitate to say that the doctrine laid down in those cases . . . is not now law. . . . I hold it to be now settled law, and that until the contrary shall have been decided by the House of Lords, it must be considered that the mere existence of a delusion is not sufficient to deprive a party of testamentary capacity." On appeal the judgment of Hall, V. C., was sustained, and Baggallay, L. J., said: "Assuming that Price was subject to certain insane delusions, as to which I think there

¹ L. R. 5 P. D. 84 (1879).

² L. R. 14 Ch. D. 674 (1880). The doctrine of Waring v. Waring is also doubted or overruled in Banks v. Goodfellow, L. R. 5 Q. B. 549, and in Boughton v. Knight, 3 P. & D. 64, which latter cases are cited with approval in Jenkins v. Morris, ubi supra.

can be no doubt, having regard to the admitted evidence in this case, that is not a sufficient reason, in my opinion, why he should be held incompetent to execute the lease in question, if the jury were satisfied that the delusions to which he was subject had not so far affected the general faculties of his mind as to render him incompetent to deal with the property which was the subject of the lease. I think that the opinion I have thus expressed is in accordance with the general principles enunciated by the President of the Probate Division in Smee v. Smee, and to which I entirely assent."

SECTION II.

CONTRACTS OF INSANE PERSONS GENERALLY VOIDABLE.

§ 275. It was a rule sanctioned by the authority of the earlier cases that the deeds, contracts, or other acts in pais of persons non compotes mentis were void, or at least voidable, in law, since such persons, being wholly bereft of reason and understanding, were considered incapable of consenting to a contract, or doing any other valid act.2 And this may be admitted to be still the general rule of law in cases where the act questioned is the direct result of the existing insanity, although the later authorities have established important exceptions to its application even in such cases. in an early case that every deed, feoffment, or grant by any man non compos mentis may be avoided, but not by himself; 8 but this limitation of the right of avoidance seems to rest upon the obsolete doctrine that no man shall be permitted to stultify himself by pleading his own lunacy in avoidance of his act; 4 and it is now the rule that the act of the insane agent may be avoided, if at all, either by himself on his restoration to sanity, or by his guardian or committee legally

¹ Beverley's Case, 4 Co. 123 b; Manby v. Scott, Sid. 109; Clerk v. Clerk, 2 Vern. 412; L'Amoreaux v. Crosby, 2 Paige, 422; Pearl v. McDowell, 3 J. J. Marsh. 658; George v. St. Louis Iron Mt. & Southern R. R., 34 Ark. 613. See ch. xii., post.

² Seaver v. Phelps, 11 Pick. 304.

Beverley's Case, ubi supra.

⁴ See § 142 et seq., ante.

appointed.¹ It is said that "the grants of infants and of persons non compos are parallel both in law and reason; "² and it would seem, in general, that the same acts on the part of a lunatic restored to reason will serve to validate his voidable contracts as would suffice for the same result in the case of an infant attaining his majority. Where a guardian purchased with his own funds, for the lunatic, a life interest in land of which the lunatic was remainder-man, and the latter, on his restoration to reason, took possession of the land and enjoyed it, and sold it to another and gave possession, it was held that this was a confirmation of his guardian's contract, and that although the guardian could not recover rent from his former ward, yet he might in equity recover the purchase-money and interest.³

§ 276. It is believed that the only cases in which the acts of the insane person will now be held absolutely void occur in those jurisdictions where the statute law provides that after office found, i. e. after the party has been judicially declared insane, he shall be incapable of any civil act or contract. And the tendency in such jurisdictions has been to restrict rather than to extend the application of the statute law. Thus in Indiana a statute providing that every contract, sale, or conveyance of any person while a person of unsound mind shall be void is held to be applicable only to persons found non compos mentis in the manner prescribed by

¹ See ch. xii. sec. iv., post.

² Thompson v. Leach, 8 Mod. 810; Breckenridge v. Ormsby, 1 J. J. Marsh. 236.

⁸ Gurley v. Davis, 7 Ala. 315; and see Grant v. Thompson, 4 Conn. 203.

In Burke v. Allen, 29 N. H. 106, it is said: "There seems to be some conflict in the decisions of the English courts upon the point whether the contracts of insane persons shall be held void or voidable only, but we think they are explainable when the technical use of the word 'lunatic' is considered. The cases where they are held voidable are those in which the person has been decreed by a court of chancery to be a lunatic from imbecility of mind and incapacity to manage his business, and not where real insanity existed. If actual insanity existed, they have been held void." It is apprehended that the distinction attempted to be drawn in this case is not to be justified by the tenor of the modern authorities.

law; 1 and a similar statute in Illinois is construed as not applying to contracts made for necessaries, or made during a lucid interval. 2 So a person declared insane may, under the statute in Missouri, make contracts with the guardian's consent; and such consent is taken to be shown by the guardian's signature to the contract. 8 So it is held, when the contract of an insane person is in question and the fact of insanity is established by other means than a legal inquisition, that the party alleging the contract may prove that it was executed in a lucid interval. 4

§ 277. The disability which will render the party incapable of contracting is that which arises from a total loss of understanding, either in respect of all subjects, or of the particular act done; and it does not always follow because, according to the modern doctrine of the courts of chancery, one might be a proper subject of a commission in the nature of a writ de lunatico inquirendo that his acts will be either void or voidable in a court of law. And though a man may not have sufficient intelligence and understanding to manage his affairs and transact business in a prudent manner, yet he may not be considered non compos mentis in such sense as to invalidate his acts, since the law does not undertake to measure the validity of a contract by the greater or less strength of mind of the contracting party. Nor will extreme

¹ G. & H. 575, § 11; Crouse v. Holman, 19 Ind. 80; Wilder v. Weakley, 34 Ind. 181; Musselman v. Craven, 47 Ind. 1; Wray v. Chandler, 64 Ind. 146; Hardenbrook v. Sherwood, 72 Ind. 408; McClaine v. Davis, 77 Ind. 419.

² Lilly v. Wagoner, 27 Ill. 895; McCormick v. Littler, 85 Ill. 62; St. 1869, p. 366, § 8.

⁸ Runnells v. Gerner, 9 Mo. App. 506.

⁴ Tozer v. Saturlee, 3 Green, 162.

⁵ See §§ 1, 2.

⁶ Jackson v. King, 4 Cow. 207.

⁷ Hovey v. Chase, 52 Maine, 804.

^{*} Osmond v. Fitzroy, 3 P. Wms. 129; Bennet v. Vade, 2 Atk. 824; Farnam v. Brooks, 9 Pick. 212; Cain v. Warford, 33 Md. 23; Hall v. Moorman, 8 McCord, 447; Same v. Same, 4 McCord, 283; Tomkins v. Tomkins, 1 Bailey (S. C.), 92; Blackford v. Christian, 1 Knapp's App. 73; Franklin v. Kelly, 2 Neb. 79; Thompson v. Gossitt, 23 Ark. 175; Henry v. Ritenour, 31 Ind. 136; Dodds v. Wilson, 8 Brev. 889.

old age, or the fact that the party is an easy victim to fraud, of itself, render his acts invalid.1

§ 278. The courts are also inclined to apply as narrowly as possible statutes limiting the right to prove the insanity of a party in collateral proceedings. Thus under a clause of the Civil Code of Louisiana,² providing that after the death of any person the validity of his acts cannot be impeached because of his insanity, unless interdiction had been decreed or petitioned for previous to his death, it was held that his heirs might set up his insanity to avoid his will, since donationes causa mortis were excepted by another clause of the Code ³ from the operation of the statute.⁴ And it is also held that although there be no interdiction, yet it will be sufficient to vitiate a contract of the deceased party, if it be shown that undue advantage was taken of his insanity or imbecility, since fraud vitiates a contract.⁵

Note. — The doctrine may be said to be established that the acts and contracts of persons who are of weak understanding, though not non compotes mentis, and who are thereby liable to imposition, will be held void in the courts of equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning or artifice. But the simple fact that the intellectual capacity of the party is below that of the average of mankind does not alone furnish sufficient ground for setting aside the contract, since when there is legal capacity there cannot be an equitable incapacity apart from fraud. See 1 Story Eq. Jur. § 238, and cases cited; 1 Fonbl. Eq. B. 1, c. 2, § 3; White v. Small, 2 Cas. in Chan. 103; Clarkson v. Hanway, 2 P. Wms. 202; Gartside v. Isherwood, 1 Bro. Ch. 558; Mountain v. Bennett, 1 Cox Eq. 353; Beaumont v. Boultbee, 5 Ves. 485, 491; Huguenin v. Basely, 14 Ves. 273, 607; s. c. 3 Lead. Cases in Equity, and notes; Pickett v. Loggon, 14 Ves. 215; Longmate v. Ledger, 2 Gif. 157. In the latter case the Vice-Chancellor observed: "By the settled doctrine of this court, in order to have a valid contract or conveyance of property there must be a reasonable degree of equality between the contracting parties. In this case it is established by

¹ Suttles v. Hay, 6 Ired. Eq. 124; Smith v. Beatty, 2 Ired. Eq. 456; Wakton v. Northington, 5 Sneed, 282. And see cases cited ante, § 8.

² 80, art. 16.

⁸ 208, art. 5.

⁴ Marie v. Avart's Heirs, 10 Martin, 25; Daunoy v. Clyma, 11 Martin, 557.

⁵ Holland v. Miller, 12 La. Ann. 624; Chevalier v. Whatley, id. 621.

the evidence that the property was sold for a price greatly below the value. This circumstance of itself might not be sufficient to invalidate the transaction. But when there is the additional fact that the vendor was a man advanced in years and known to be of a weak and eccentric disposition, and at the time of the sale was without the assistance of a disinterested legal adviser, there exists in the whole case such an inequality between the contracting parties, that it is to my mind impossible for the court to recognize the claim of the defendant to hold the property under the contract, except as a security for the payment of the moneys which have been actually advanced." See the following American cases on this subject: Whitehorn v. Hines, 1 Mun. 557; Hale v. Brown, 11 Ala. 87; Cruise v. Cristopher, 5 Dana, 182; Rippy v. Gant, 4 Ired. 443; Keeble v. Cummins, 5 Hayw. (Tenn.) 44; Gass v. Mason, 4 Sneed, 497; Tally v. Smith, 1 Cold. 290; Whelan v. Whelan, 3 Cow. 571; Jackson v. King, 4 Cow. 218; Barker, in re, 2 Johns. Ch. 232; Wheeler v. Smith, 9 How. U. S. 76; Yard v. Yard, 12 C. E. Green, 114; Wray v. Wray, 32 Ind. 126; Bunch v. Shannon, 46 Miss. 525; Simonton v. Simonton, 49 Miss. 582; Ward v. Buckley, 1 Wash. Terr. 279; Jacox v. Jacox, 42 Mich. 473; Kilgore v. Cross, 1 McCrary, 144; Kelly's Heirs v. McGuire, 15 Ark. 556; Watson v. Smith, 7 Oregon, 448. And it is also a rule in the courts of equity that no person who stands in a relation of special confidence to another, so as to acquire habitual influence over his mind, can accept any gift or benefit from the person who is under the dominion of that influence, unless a sufficient protection has been interposed against the exercise of such influence. Thus a gift by a person of weak intellect of her whole fortune to one who had acquired a great influence over her mind by making her and others believe that he sustained a supernatural character, was held invalid. Nottidge v. Prince, 2 Gif. 246.

SECTION III.

EXCEPTIONS TO THE RULE.

(a.) Contracts for Necessaries.

§ 279. An admitted exception to the general rule which makes the acts and contracts of insane persons void or voidable in law is found in those cases where the contract made was for necessaries supplied to the insane person in good faith and suitable to his condition in life. The leading case upon this subject arose where a tradesman had supplied a person with goods suited to his station, and afterwards, by an inquisition taken under a commission of lunacy, that person was found to have been insane before and at the time when the goods were

ordered and supplied. At the trial before a jury, Abbott, C. J., presiding, it was held that this was not a sufficient defence to an action for the price of the goods, the tradesman, at the time when he received the orders and supplied the articles, not having any reason to suppose that the defendant was a lunatic. At the hearing in bank on a motion for a new trial, Abbott, C. J., said: "I was of opinion at the trial that the evidence given on the part of the defendant was not sufficient to defeat the plaintiffs' action. It was brought to recover their charges for things suited to the state and degree of the defendant, actually ordered and enjoyed by him. At the time when the orders were given and executed, Lord Portsmouth was living with his family, and there was no reason to suppose that the plaintiffs knew of his insanity. I thought the case very distinguishable from an attempt to enforce a contract not executed, or one made under circumstances which might have induced a reasonable person to suppose the defendant was of unsound mind. The latter would be cases of imposition; and I desired that my judgment might not be taken to be that such contracts would bind, although I was not prepared to say that they would not. Upon further consideration, I find no reason for thinking that my direction to the jury was erroneous, or that the verdict should be disturbed." 1 The ruling below was sustained on appeal, and the principle on which it rests has been adopted in the courts of England and the United States. But it would further seem, from the tenor of the reported decisions, that the fact that the person dealing with the insane party is aware of such party's mental condition will not, of itself, vitiate the contract for necessaries, so long as these are supplied in good faith; the prevailing opinion at the present day appearing to be that "the executed contract of a non compos mentis for necessaries bona fide supplied stands on the footing of an infant's contract for necessaries."2 In the case of the insane party, as in that of the infant,

¹ Baxter v. Earl of Portsmouth, 5 B. & C. 170 (1826); s. c. 2 C. & P. 178, 7 Dowl. & Ry. 614. And see the early case of Stiles v. West, cited in Manby v. Scott, 1 Sid. 109; Howard v. Digby, 2 C. & F. 684; Leach v. Marsh, 47 Maine, 548; Henry v. Fine, 28 Ark. 417.

² Gibson, C. J., in La Rue v. Gilkyson, 4 Penn. St. 375.

the law will imply a contract in favor of the vendor. Accordingly it is held that one having a claim against an insane person for necessaries furnished cannot sustain a suit in equity for the value of such necessaries, his remedy being by an action of assumpsit at law. And a like rule is applied when the necessaries furnished are for the proper maintenance and support of the family of the insane person, or the necessary protection of his person or estate.

§ 280. But the word "necessaries," as applied to the insane person himself, is not so limited in its construction as to include merely articles of the first necessity but it is construed to include everything advantageous and proper for the insane person's condition; for "the maintenance of a lunatic is not limited as an infant's is, within the bounds of income. It is not limited except by the fullest comforts of the lunatic. Fancied enjoyments and even harmless caprice are to be indulged within the limits of income." Thus it was held that one who, at the request of an insane person of wealth having no guardian, had taken such a person on a journey for pleasure might recover of him the expenses of the journey, provided these appeared to be reasonable and proper under the circumstances.

§ 281. Following the application of the principles stated, it is held that, at common law, the estate of an insane person

- Wentworth v. Tubb, 1 Y. & C. 171; Williams v. Wentworth, 5 Beav. 325; Johnson v. Ballard, 11 Rich. 178; Northington, ex parte, 37 Ala. 496; Wallis v. Manhattan Co., 2 Hall, 495; Van Horn v. Hann, 10 Vroom, 207; Lancaster Co. N. Bank v. Moore, 78 Penn. St. 407.
 - ² Tally v. Tally, 2 Dev. & Bat. Eq. 385.
- Pearl v. McDowell, 3 J. J. Marsh. 658; Shaw, C. J., in Shaw v. Thompson, 16 Pick. 198.
 - 4 Williams v. Wentworth, ubi supra.
- ⁵ Baxter v. The Earl of Portsmouth, 5 B. & C. 170; La Rue v. Gilkyson, 4 Penn. St. 375; Barnes v. Hathaway, 66 Barb. 452.
 - ⁶ Persse, in re. 3 Molloy, 94.
- ⁷ Kendall v. May, 10 Allen, 59. In Howard v. Digby, 2 C. & F. 684, it is held that if a wife becomes lunatic, and during her lunacy the husband supports her in a style befitting her rank, he shall be presumed to have satisfied the purposes for which pin-money was settled on the wife, and shall not, after her death, be liable to any demand in respect of arrears of pin-money, alleged to have been left unpaid during her life.

under guardianship is liable for necessary nursing and care furnished in good faith and under justifiable circumstances,1 or for medical attendance on such person; 2 and where one is so insane as to attempt injury to himself and the destruction of his property, the services of a guard to his person fall within this class of necessaries as defined by law.8 Where a defendant, under guardianship as a lunatic at the time of the contract, purchased groceries necessary for the use of himself and his family of one ignorant of the fact of guardianship, it was held that the lunatic's estate was liable for the amount of the necessaries furnished.4 And where such a person hired another to do his housework, and she did it accordingly, for a year, during which time the defendant managed his farm, property, and household affairs in his own way, without interference from his guardian, it was held that he was answerable at law for the debt. Where a defendant, during the time overreached by a finding of lunacy, borrowed money by the advice of counsel, which he prudently applied to the payment of liens on his estate, it was held that the lunacy was no defence to an action for the recovery of the loan.6

§ 282. Proof will be allowed against the estate of a de-

- ¹ Sawyer v. Lufkin, 56 Maine, 308.
- ² Pearl v. McDowell, 3 J. J. Marsh. 658.
- * Richardson v. Strong, 13 Ired. 106.
- ⁴ Shaper v. Wing, 2 Hun, 671; s. c. 3 Thomp. & Cook, 693. For a case where a horse, purchased by a lunatic for use upon a plantation held for him in trust, was adjudged not to be a necessary for the price of which he was liable, see Munday v. Mims, 5 Strob. 132.
- ⁵ Blaisdell v. Holmes, 48 Vt. 492. On the other hand, the law will imply an obligation on the part of one benefited by the labor and service of a lunatic to pay for such service, and upon such obligation an action may be maintained in the courts. Ashley v. Holman, 15 S. C. 97.
- ⁶ Kneedler's Appeal, 92 Penn. St. 428. And in Nelson v. Duncombe, 9 Beav. 211, it was held that where a trustee had expended sums of money for the protection and safety, or for the maintenance and support, of his insane cestui que trust, at a time when he, though an adult, was incapable of taking care of himself, the court would allow him credit for such sums of money; and even where one, without authority, but acting in good faith, assumed the management of a lunatic's property, the court, before restoring the property, made him an equitable allowance for his expenses and liabilities. Selby v. Jackson, 6 Beav. 192.

ceased lunatic for money advanced to his wife during his lunacy, and applied by her in payment of her necessary expenses, though she had a separate income, it being considered that when a husband becomes lunatic, and so unable to provide his wife with necessaries, he is in the same situation as one omitting to furnish them; and since by the contract of marriage he undertook to provide her with necessaries, he is liable to any person who does this for him.2 And where a wife filed a bill in equity for a divorce on the ground, among others, of the husband's lunacy, and the court made an order pendente lite,8 allowing a certain sum per annum for the maintenance of herself and her children, and the husband afterwards was restored to sanity and the bill dismissed, it was held that an action of assumpsit would lie against the husband to recover a sum of money due for the children's tuition on a contract made by the wife pending the bill for divorce.

- ¹ Wood, in re, 1 De G. J. & S. 465.
- ² Read v. Legard, 6 Exch. 636.
- In McEwen v. McEwen, 2 Stock. 286, a motion to allow counsel fees and maintenance to the libellant, pending her petition for divorce on the ground of abuse and ill-treatment, was refused as against one who had been declared a lunatic by the court. The Chancellor said: "The order implies a default and a neglect of a moral obligation on the part of the defendant. This ought not to be imputed to a lunatic."
- ⁴ Harris v. Davis, 1 Ala. 259. This case is distinguished from West-morland v. Davis, id. 299, in which latter case it was held that a lunatic after his restoration to reason was not liable on an implied promise to pay for necessaries furnished during his lunacy, although a promise made after his restoration would be binding; and the court said that the plaintiff's remedy, if any, was in equity. In Harris v. Davis the court said: "If the plaintiff cannot maintain his action he is without remedy. I think this action, which is in the nature in many respects of a suit in equity, may be maintained from the necessity of the case, as otherwise there would be a failure of justice."

Where, in an action brought against the committee of a lunatic to recover for necessaries furnished to one claiming to be his wife, it appeared that a marriage was duly solemnized between the lunatic and the woman, and that it was followed by cohabitation, continuing down to the time of the appointment of the committee, when the woman was obliged to leave and live apart from him, it was held that the committee could not set up as a defence the fact that the marriage was void because the husband was at the time of its solemnization and ever since had been a lunatic without lucid intervals. Stuckey v. Mathes, 24 Hun, 461.

Where one had indorsed the notes of a self-constituted agent of a lunatic in order to enable the agent to raise money, ostensibly for the benefit of the lunatic's family, which money was used by the agent in cultivating the farm of the lunatic for the agent's own advantage, it was held that the indorser could only recover, in a suit against the lunatic on the notes signed by the agent, so much of the debt as was actually expended for the necessary support of the lunatic and such of his family as were properly chargeable upon him. And where one who afterwards became insane had given his wife authority to pledge his credit with a tradesman for necessaries, and during the period of his insanity the wife ordered goods from the tradesman, who was ignorant of the husband's insanity, it was held, in an action brought against the husband after his restoration to reason for the price of the goods furnished, that the husband was liable for the price of the goods.2 But where a husband and wife resided in a house until the husband became lunatic, and the wife continued to reside in it after his removal to a lunatic asylum, she has no authority to pledge his credit for necessary repairs, if she receives from his estate means sufficient for such repairs.8

§ 283. Where a wife had been appointed custodian of her insane husband by the commissioners of insanity, for a compensation fixed, the majority of the court held that the contract was void for want of consideration, the wife owing the service independently of any contract. Where one had incurred expenses in maintaining his lunatic step-son, it was held that, under the statute 3 & 4 Wm. IV. c. 104, he could not recover these expenses as against the freehold estate of the lunatic, since the relation of the parties forbade the idea of an implied contract between them, but that funeral expenses of the lunatic incurred by the step-father were chargeable against the personal estate of the lunatic in the hands of his executor.

¹ Surles v. Pipkin, 69 N. C. 513.

² Drew v. Munn, L. R. 4 Q. B. D. 661.

^{*} Richardson v. Dubois, 10 Best & S. 830; s. c. L. R. 5 Q. B. 51.

⁴ Grant v. Green, 41 Iowa, 88.

⁵ Carter v. Beard, 10 Sim. 9, as explained in Wentworth v. Tubb, 1 Y. & C. 171.

But where the expenses of the maintenance of a lunatic in a private asylum had been defrayed by the brothers of the lunatic, and afterwards a legacy was paid to them to be applied to the lunatic's benefit, the legacy was ordered to be retained by the brothers as reimbursement for the lunatic's part maintenance, in preference to the claims of the county, who were then supporting the lunatic in a public asylum.1 And where an insane person had been maintained in a lunatic asylum by his parish, a portion of the capital of a fund belonging to him which had been paid in under the Trustee Relief Act 2 was ordered to be applied to defray the past charges of the parish.8 In a case in which a third party had made a written contract on behalf of an insane person with the keeper of a private lunatic asylum, to pay the board and other expenses of such person at the asylum, which contract differed in its terms from that which the law would imply as against a lunatic, it was held that no promise could be implied on the part of the insane person to pay anything.4 In an action on a bond conditioned for the support and maintenance of the obligee and his lunatic son, brought by one who had furnished supplies to the obligee and son, it was held not to be sufficient to allege, as a breach of the bond, that the obligee and his son, after the death of the obligor, went to the plaintiff's to reside and were there supported; without an averment of a request that the defendants would perform the condition of the bond, or of their refusal or neglect to do so, except the fact that the administratrix of the obligor had refused to pay the plaintiff's account for the support and maintenance furnished.

Gibson, in re, L.R. 7 Ch. App. 53. Where a person convicted of murder, before sentence was passed, was found to be insane, discharged from imprisonment, and sent to a state lunatic asylum, and his expenses there were paid by the treasurer of the county from which he was sent, it was held that the supervisors of the county could recover from the committee of the criminal's estate the amount so advanced, it being proved that the committee held property of the criminal more than sufficient for the purpose. Supervisors of Onondaga Co. v. Morgan, 4 Abb. App. Dec. 335.

² 16 & 17 Vict. c. 97, § 104.

^{*} Buckley's Trusts, in re, Johns. 700.

⁴ Mass. Gen. Hospital v. Fairbanks, 132 Mass. 414.

⁵ McKillip v. McKillip, 8 Barb. 552.

§ 284. Costs and counsel fees reasonably incurred by either party in proceedings to establish the lunacy of a person are regarded, both at law and in equity, as necessary expenses incurred for the benefit of the lunatic, and are recoverable against him or his estate.¹ In an early case it was held that a solicitor employed by the party alleged insane could have no action against such party for his costs, but might have a lien on real estate recovered for the use of the lunatic, while in the hands of the committee, but not in the hands of the lunatic's heir.² But the modern view of the matter is that the costs, charges, and expenses in lunacy proceedings are not to be considered so much a charge on the lunatic's real estate as a simple contract debt due by the lunatic for necessaries.8

§ 285. Thus it is held that the costs of issuing a commission of lunacy, if for the benefit of the alleged lunatic, may be recovered as against his estate after his death, notwithstanding the pendency of a traverse of the inquisition.⁴ And where one restrained of his personal liberty, against his will and without legal process, as being an insane person, employed counsel to prosecute a writ of habeas corpus in his own behalf for the purpose of investigating the grounds and circumstances of the restraint, it was held that the counsel employed would be entitled to recover compensation for his services, if rendered in good faith upon due inquiry into the causes of the restraint, and if the condition of the party were such as to render a judicial investigation proper.⁵ So where one was confined by his relatives as being mentally incapable of managing his affairs, and his wife, who was living apart from

¹ Williams v. Wentworth, 5 Beav. 825; Chester v. Rolfe, 4 De G. Mac. & G. 798; Meares, in re, L. R. 10 Ch. D. 552 (and see St. 8 & 4 Wm. IV. c. 104); Wier v. Myers, 34 Penn. St. 377. See § 141, ante.

^{*} Barnesley v. Powell, Amb. 102 (1749). See Tayler v. Tayler, S Mac. & G. 426.

^{*} Stedman v. Hart, Kay, 607. Under the Civil Code of Louisiana counsel fees due for successfully defending a wife in a suit for her interdiction brought by her husband are a debt for the community between husband and wife. R. C. C. 2403-2409; Breaux v. Francke, 80 La. Ann. 836.

⁴ Cumming, in re, 5 De G. Mac. & G. 80.

⁵ Hallett v. Oakes, 1 Cush. 296.

him, sent physicians to inquire into his condition, who, as well as herself, were refused access to him, and she thereupon took proceedings in lunacy to test the question of his insanity, it was held that her costs ought to be paid by the husband upon his subsequent recovery.¹

§ 286. Although it is the rule in England that a committee appointed by a court of chancery to take charge of the person of a lunatic shall receive no compensation for his services,2 this rule does not obtain in the United States; 8 and where such a committee was ordered to convey his charge from New York to India, it was considered that the committee should be properly remunerated for his service.4 And where, on the traverse of an inquisition, the alleged lunatic was found not to be of unsound mind, and the court made an order superseding the commission and inquisition and directing that the property be restored to the alleged lunatic, it was held that the committee was entitled to legal expenses incurred in the proceeding on the inquisition and in opposing the traverse of it, including bills of the attorneys of the committee, and a reasonable counsel fee on trial of traverse, and all disbursements; to be paid out of the funds of the estate in the hands of the committee.⁵

(b.) When the Consideration of a Fair and Executed Contract cannot be restored.

- § 287. The equitable considerations which induce the courts to enforce the contracts of insane persons for necessa-
- ¹ F., in re, 2 De G. J. & S. 89. And it is held that the necessary expenses of a guardian of an insane person, incurred in resisting an application for his removal from the guardianship, should be allowed as against the estate of the insane person. Palmer v. Palmer, 38 N. H. 418.
 - ² Seè § 89, ante.
 - * See § 90, ante.
 - 4 Colah, in re, 3 Daly, 529; and see Same, 6 Daly, 51.
- Clapp, in re, 20 How. Pr. 385. But in Conklin, in re, 8 Paige, 450, where a solicitor appeared, in behalf of one against whom a commission of lunacy had issued, to oppose the same, but the jury, notwithstanding, found such person to have been a lunatic at the time of the retainer, it was held that the solicitor had no legal claim against the estate of the lunatic, on the ground of contract, for his services upon the execution of

ries have been further extended, and it may now be stated as a rule adopted by the English, and most American, courts, both of law and equity, that "when a person apparently of sound mind and not known to be otherwise enters into a contract for the purchase of property which is fair and bona fide, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in statu quo, such contract cannot afterwards be set aside either by the alleged lunatic or those who represent him."2 This rule had its origin in the courts of equity, it having been held in an early case that equity will not interfere to set aside a contract overreached by an inquisition in lunacy, if fair and without notice, especially where the parties cannot be reinstated. And in the same case Sir William Grant, M. R., said: "If the plaintiff is right . . . in saying all this is void at law, let him resort to law and recover if he can. But there is no ground for a court of equity to advance his remedy; when it is impossible to exercise the jurisdiction so as to afford any chance of doing justice to the other party. . . . If the defendant could be put in mala fide, as having notice, that would be a distinct and different ground for the interference of a court of equity."8

§ 288. This doctrine of the equity courts was not, at first, adopted in express terms by the courts of law, which are said to have proceeded "upon the ground that neither infants nor lunatics have legal capacity to contract." But in 1827 Lord Tenterden had intimated an opinion that, in an action of contract, the defence of insanity should not avail, "unless it be shown that the plaintiff imposed on the defendant." 5

the commission. In this case a small allowance was made by the court to the solicitor, and it was said that such a matter was within its discretion.

- ¹ Hassard v. Smith, 6 Ir. Rep. Eq. 429.
- ² Pollock, C. B., in Molton v. Camroux, 2 Exch. 487; Scanlan v. Cobb, 85 Ill. 296.
- * Niell v. Morley, 9 Ves. 478 (1804); Loomis v. Spencer, 2 Paige, 153; Carr v. Holiday, 1 Dev. & Bat. Eq. 344; Same v. Same, 5 Ired. Eq. 167.
 - 4 See Loomis v. Spencer, ubi supra.
- ⁵ Browne v. Joddrell, Mood. & Malk. 105. For an apparently imperfect or erroneous report of this case see 8 C. & P. 30.

And in the leading case of Molton v. Camroux 1 (1848) the application of the equitable doctrine to cases at law was very elaborately discussed. It was broadly contended in the latter case that the executed contracts of a lunatic must be dealt with as absolutely void, however entered into, and although perfectly fair, bona fide, reasonable, and without notice on the part of those who have dealt with the lunatic. This doctrine was disapproved by Pollock, C. B., who laid down the rule already stated. Upon appeal, this view of the law was sustained in the Exchequer Chamber, where Patteson, J., in pronouncing the opinion of the judges, said: "The modern cases show, that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defence cannot prevail, especially where the contract is not merely executory, but executed in the whole or in part, and the parties cannot be restored altogether to their original position. The cases which are apparently the strongest for the defendant are those of contracts of marriage decided in the ecclesiastical courts. But all those cases are such that the other contracting party must have known, or have had the greatest reason to believe, that the unsound state of mind existed, although they do not appear to have been decided on that precise ground."

§ 289. The pleadings in Molton v. Camroux did not aver that the lunatic was incapable of understanding the nature of a contract. But in a later case, where the replication supplied this supposed defect in pleading by averring that the plaintiff was a lunatic and of unsound mind, and thereby incapable of contracting or understanding the meaning of a contract, it was held, on the argument upon the demurrer, that the case fell within the principle of Molton v. Camroux,

¹ 4 Exch. 17. In this case the lunatic had purchased certain annuities of a society which at the time had no knowledge of his unsoundness of mind, the transaction being in the ordinary course of the affairs of human life, and fair and bona fide on the part of the society, and the consideration of the contract being clearly sufficient. It was held that, after the death of the lunatic, his personal representatives could not, in an action of assumpsit, recover back the premiums paid for the annuities.

and that the plaintiff could not recover. The doctrine of Molton v. Camroux and Beavan v. M'Donnell is now generally accepted both in England and the United States. The applications of the same rules to cases in which it is sought to set aside conveyances of real estate made by lunatics are fully considered in another place.

- § 290. The rule stated has been applied in a great variety of cases. In an action brought against the insane person for use and occupation of the plaintiff's premises, and for things useful and necessary furnished him, it was held that the defendant was liable, the contract being fair and beneficial to him, and the plaintiff being ignorant of the fact that he was insane. It was further held that such a contract could not be rescinded without first showing the practice of fraud, undue advantage, or other imposition in the plaintiff, since his labor and services had entered largely into the consideration of the contract and could not be restored, nor could compensation be easily made therefor. It seems that an obligation entered
- 1 Beavan v. M'Donnell, 9 Exch. 309. In this case the plaintiff entered into a written contract to purchase land, which provided that he should make a deposit of money, should receive an abstract of the title within a certain time, and make his objections thereto, if any, within a certain further time specified. He paid the deposit, received the abstract, and made no objections to the title within the time limited. The suit was brought to recover back the deposit, and it was admitted that the plaintiff was a lunatic, and as such unable to understand the nature of the contract; but the defendant was ignorant of this, and the transaction was, on his part, bona fide. In delivering judgment, Parke, B., said: "This action is not brought on an executory contract. . . . It is a transaction completely executed, so far as the deposit is concerned. The defendant has done all he was bound to do to make it his own; and the plaintiff has had all he bargained for: the power of buying the estate."
- ² But see, contra, Fitzgerald v. Reed, 9 Sm. & Marsh. (Miss.) 94; Hines v. Potts, 56 Miss. 346; Chew v. The Bank of Baltimore, 14 Md. 299. In the latter case the following dictum occurs: "There are cases in England to show that such persons [lunatics] are bound by their contracts, unless fraud or imposition has been practised; but to this we cannot assent. The doctrine in this country is the other way, and, as we think, is sustained by better reasoning than the English rule as announced in some of their decisions."
 - See ch. xii.
- ⁴ Young v. Stevens, 48 N. H. 133; and see Moss v. Tribe, 3 F. & F. 297; Dane v. Kirkwall, 8 C. & P. 679.

into by an insane person to repay money loaned, of which he had the benefit, is valid where the lender acted in good faith, without fraud or unfairness, and without knowledge of the insanity, or notice or information calling for an inquiry; and an action is accordingly maintainable on such an obligation. And the fact that the borrower was subsequently, upon inquisition taken, declared to be insane does not affect the right to recover. It is held that an executed contract by a merchant for the purchase of goods, made before the day from which an inquest afterwards finds him insane, cannot be avoided by proof of insanity at the time of the purchase, unless there has been a fraud committed on him by the vendor, or the latter has knowledge of his condition.

§ 291. Where one, during the time overreached by an inquisition finding him a lunatic, made a fair exchange of slaves for land of which he enjoyed the possession for many years, it was held that he could not prevail in a suit subsequently brought to recover back the slaves, no fraud being shown in the transaction.4 It is held that a judgment entered on a bond and warrant of attorney executed by an obligor subsequently found by inquisition to have been at the time of execution of unsound mind, and incapable of governing himself or managing his affairs, will not be set aside unconditionally, where it appears from the evidence that the alleged lunatic was, for several years prior to the execution of the bond and warrant, permitted by his friends to exchange lands, to buy and sell real and personal property, and give notes, and that no fraud, notice, or want of good faith was alleged in the pleadings; 5 and in a suit for damages on an injunction bond, brought for the wrongful suing out of the writ, it was held, in an opinion by Dillon, J., that the plea of the

¹ Mutual Life Ins. Co. v. Hunt, 79 N. Y. 541.

² See § 66, ante.

Beals v. See, 10 Penn. St. 56. In this case it appeared that the goods were unsuited to the object for which they were purchased, and that the price agreed on far exceeded their market value. No authorities are cited, and the opinion, by Gibson, C. J., rests on general equitable grounds. See also Wilder v. Weakley, 34 Ind. 181.

⁴ Hopson v. Boyd, 6 B. Mon. 296.

⁵ Person v. Warren, 14 Barb. 488.

insanity of the obligor was no defence, it appearing that he was in the habit of transacting his own business, and there being no evidence that his insanity was known to the plaintiff. It is held, if a contract for the sale of goods made by a person alleged to be a lunatic be invalid when made, by reason of non-compliance with the statute of frauds, and the buyer relies on a subsequent delivery to validate the sale, that a charge submitting the question "whether the seller was competent to make the bargain, and, if so, whether his competency continued so as to enable him to complete and perfect the bargain by delivery," is correct.²

§ 292. Applying the converse of the principles stated, an improvident agreement to transfer personal property for a consideration grossly inadequate, made by one of great imbecility of mind with another having undue influence over him, was set aside, although there appeared no direct evidence of fraud in the transaction. So where, upon a bill in equity brought by one of the next of kin against an intestate's administrator for a distributive share of the estate, the defence was a release to the administrator executed by the complainant, the release was declared void by the Chancellor for want of mental capacity in the complainant, the consideration being

- ¹ Behrens v. McKenzie, 23 Iowa, 333.
- ² Matthiesson & Weichers Refining Co. v. McMahon, 9 Vroom, 536. In this case the subject of the liability of insane persons on their contracts is discussed elaborately.

In the case of an officer of the army who, while insane, resigned his commission, whereupon his successor was appointed, it was held, in an action brought by the officer to recover back pay for the time subsequent to his resignation, on the ground that the resignation, being an insane act, was inoperative, that the case was analogous to that of a person of unsound mind in an ordinary civil tribunal, and that, since the President acted upon the resignation and appointed a successor who accepted the office, the loss must fall upon the officer who caused the vacancy, notwithstanding his insanity. Blake v. The United States, 14 Ct. of Claims Repts. 462.

* Cook v. Cole, 2 Halst. Ch. 522, 627. It may be remarked that the tenor of the decided cases appears to sanction the rule that when a contract is obtained from an insane person for a manifestly inadequate consideration, this circumstance, not being explained, will be taken for a badge of fraud, upon the application of the insane party or his representatives to have the contract pronounced void.

grossly inadequate.1 Where a party executed a paper, purporting to be a written release, discharging his right of action against a railway company for injuries complained of, and at the time of executing it he was so far under the influence of drugs and opiates taken to alleviate his pains, caused by a broken thigh, that he was mentally incapacitated to contract, it was held that such a release was voidable and not a defence to his cause of action.² It is held that while a contract with one not known to be of unsound mind may be sustained, if it shall be proved to have been fairly made and without advantage having been taken of the lunatic, yet neither money advanced nor compensation for services rendered to a lunatic can be recovered from him if the circumstances were such as to put the party on inquiry as to his mental condition.8 But in another case it is said that to vitiate a contract the knowledge of the lunacy or incapacity must be, not merely actual, but presumably sufficient, - from circumstances known to the other contracting party, - to lead him to a reasonable conclusion that the person with whom he is dealing is of unsound mind.4

(c.) Executory Contracts.

§ 293. In no case will a court of equity interfere to set aside deeds or contracts upon the ground of a party's insanity, except upon equitable terms, applying the maxim, that he who seeks equity must do equity.⁵ This principle is adopted

- ¹ Rickey v. Davis, 3 Halst. Ch. 378.
- ² Chicago, Rock Island, & Pacific R. R. v. Doyle, 18 Kan. 58.
- * Beckwith, in re, 3 Hun, 443. And see, to the same effect, the opinion by Redfield, J., in Lincoln v. Buckmaster, 32 Vt. 652.
- 4 Hassard v. Smith, 6 Ir. Rep. Eq. 429. And see opinion of Sir John Romilly, M. R., in Greenslade v. Dare, 20 Beav. 284, 290. So under the Civil Code of Louisiana (80, art. 15) it is held that, unless there has been an interdiction, the insanity must have been notorious in order to put the party contracting with him upon inquiry. Louisiana Bank v. Dubreuil, 5 Martin, 416; Smith's Succession, 12 La. Ann. 24. See McDonald v. McDonald, 14 Grant's Ch. 545.
- ⁵ Canfield v. Fairbanks, 63 Barb. 461 and cases cited. "If a purchase is made in good faith, without any knowledge of the incapacity, and no advantage had been taken of the party, courts of equity will not

by the courts of equity in dealing with the executory contracts of insane persons; for while it is said that the courts will never enforce such contracts except they be made for necessaries which have been actually furnished to the insane person, yet where a lunatic has received the benefit of property sold to him in good faith by one who has no knowledge of his incapacity to contract, and no advantage having been taken of his situation, a court of equity will not interfere to set aside the contract on the suit of the lunatic. Thus where the creditor of an insane person, on the sale of property to the latter made in good faith, had obtained a legal security from the vendee, the court refused to deprive him of his security without restoring to him so much as the estate of the lunatic has been actually benefited by the sale.²

§ 294. So where one had contracted for the purchase of real estate, and before the completion of the transaction a writ

interfere to set aside the contract, if injustice will thereby be done to the other side, and the parties cannot, be placed . . . in the state in which they were before the purchase." 1 Story Eq. Jur. § 228. See also Corbit v. Smith, 7 Iowa, 60. But see, contra, Henry v. Fine, 23 Ark. 417; Tolson v. Garner, 15 Mo. 494; Halley v. Troester, 72 Mo. 73. These were cases in which the question of the validity of sales of personal property was involved. The application of the rule stated in the text to cases of conveyances of lands by lunatics has been questioned, but the rule is believed to be supported by the weight of authority. For a full discussion of the subject, see ch. xii. sec. v., post, and cases there cited.

- ¹ Corbit v. Smith, 7 Iowa, 60; Loomis v. Spencer, 2 Paige, 153. See ch. xii. sec. vi. Where an attorney to whom a clerk had been articled became insane during the clerkship, the court allowed the clerk to enter into new articles with another attorney. Darbell, ex parte, 6 Dowl. Pr. Cas. 505. See Riggs v. American Tract Soc., 84 N. Y. 330.
- 2 Loomis v. Spencer, ubi supra. This was a bill in equity to set aside a judgment obtained against the lunatic. The Chancellor, in giving judgment, said: "There is no doubt of the propriety of the courts refusing to enforce executory contracts entered into by a lunatic or an infant; and probably no recovery could be had in either case in a court of law. The courts proceed upon the ground that neither has legal capacity to contract. Although a contract of purchase made by either, except for necessaries, could not be enforced, yet a court of equity ought not to interfere where the infant or lunatic has actually had the benefit of the property, if the contract was made in good faith, without knowledge of the incapacity, and where no advantage has been taken of the situation of the party."

de lunatico inquirendo was issued, under which he was found to have been insane from a time anterior to the date of the contract, the contract was declared void upon a bill brought to enforce its performance; but the plaintiff was directed to retain out of the deposit money of the transaction all his costs, charges, and expenses incurred. And where one entered in good faith into a contract with an insane person, without knowledge of his insanity, and in pursuance of the contract rendered him valuable services in prosecuting successfully a claim for a distributive share of an estate, it was held that although the contract was void, yet the party rendering the services was entitled to a just and reasonable compensation therefor.²

SECTION IV.

CONTRACTS OF DRUNKARDS.

§ 295. Loss of reason occasioned by drunkenness is considered by the earlier writers as a species of lunacy, and so it is held that no person can make a binding contract while he is wholly deprived of his reason by intoxication. And this is the rule although the intoxication was not procured by the other party to the contract, but is voluntary on the part of the drunkard. But the incapacity to reason must extend to the subject-matter of the contract in order to render it voidable. The drunkenness of one of the contracting parties does not make the contract void, but only voidable; and, in order to

- ¹ Frost v. Beavan, 17 Jur. 369.
- ² Ballard v. McKenna, 4 Rich. Eq. 358.
- Beverley's Case, 4 Co. 123 b; Harbison v. Lemon, 8 Blackf. 51.
- * Prentice v. Achorn, 2 Paige, 80; Cole v. Robbins, Bul. N. P. 172; Pitt v. Smith, 3 Camp. 33; Morris v. Clay, 8 Jones (N. C.), 216; King v. Bryant, 2 Hayw. 894; White v. Cox, 3 Hayw. 78.
- ⁵ Wigglesworth v. Steers, 1 Hen. & Mun. 70; Barrett v. Buxton, 2 Aiken, 167.
- Arnold v. Hickman, 6 Mun. 15; Schramm v. O'Conner, 98 Ill. 539; Henry r. Ritenour, 31 Ind. 136; Reynolds v. Dechaums, 24 Tex. 174; Lee v. Ware, 1 Hill (S. C.), 813; Johnson v. Rockwell, 12 Ind. 76.
- 7 1 Story Cont. § 45; McGuire v. Callahan, 19 Ind. 128; Joest v. Williams, 42 Ind. 565.

avoid it, the party must, on his restoration to reason, disavow it, and restore the consideration received from the other party, if any. The contract must be rescinded within a reasonable time in order to avoid it. And as a complete recovery from intoxication must generally follow closely the act sought to be avoided, it would seem that the act of avoidance cannot, in order to be effectual, be postponed after such recovery and knowledge of the acts done during intoxication; and any unnecessary postponement of the avoidance may be taken by a jury as a ratification of the contract.

§ 296. In conformity with principles heretofore stated,⁴ courts of equity will not assist a party to avoid his contract merely on the ground of his intoxication at the time such contract was made, unless it appear that some fraud or imposition was practised upon him, or that an extreme state of intoxication existed, such as would deprive a man of his reason, and which, at law, would invalidate his act.⁵ On the

- ¹ 2 Kent Com. 451; Jenness v. Howard, 6 Blackf. 240; Reinskopf v. Rogge, 37 Ind. 207.
 - ² Cummings v. Henry, 10 Ind. 109.
- In Williams v. Inabnet, 1 Bailey (S. C.), 843, it was said that the contract should not be rescinded, where the subsequent conduct of the party is such as to have the appearance of his having confirmed it. "If, for instance, he does not return what he received, as the consideration of his contract, the instant he is restored to his senses, the jury may infer that he intends it to be confirmed."
 - 4 See §§ 270, 287, ante.
- Ev. Baylor, 3 Dru. & War. 12; Story Eq. Jur. § 231; Crane v. Conkling, Sax. 346. In Campbell v. Ketcham, 1 Bibb (Ky.), 406, it was held that no degree of drunkenness is a cause for avoiding a bond, unless the obligor was drawn into drink by the party with whom he contracted, or an unreasonable or unconscientious advantage was taken of his situation. And see, to the same effect, Hall v. Moreman, 3 McCord, 477; Same v. Moorman, 4 McCord, 283. The rule thus laid down, as far as expressed in the words italicized, appears to be founded upon expressions contained in Johnson v. Medlicott, 3 P. Wms. 130, note [A], where it is said that the having been in drink is not any reason to relieve a man against any deed or agreement gained from him when in those circumstances; for this were to encourage drunkenness; secus, if through the management or contrivance of him who gained the deed the party signing it was drawn into drink. But this distinction seems wholly unsatisfactory; for in each case it is

other hand, the general rule obtains that a court of equity will not assist one who has obtained from a person intoxicated, or who wishes to avoid, an agreement or deed, on the mere ground of such person's intoxication.¹

§ 297. So it is held that equity will relieve against a conveyance when the grantor, through intoxication, was, to the grantee's knowledge, not himself, and there was no consideration for the deed,2 or when the consideration was grossly inadequate.³ Thus a lease obtained by fraud and circumvention from a person in a state of intoxication is void in equity;4 and such a lease which had been executed immediately upon the lessor's coming of age was set aside, although he had done acts to confirm it.5 It is held that a party may, in order to defeat a settlement made by him, show that at that time he was incapable of contracting intelligently by reason of intoxication; and evidence of the party's condition as to being intoxicated several hours after the settlement may be given as tending to throw light on his condition when the settlement was made. Where a party who was reduced to a state of mental imbecility by habitual intoxication made a voluntary and irrevocable deed of gift of his whole estate to a cousingerman, to the disherison of his natural heirs, reserving to himself a use for life, without any reasonable motive being assigned for such gift, it was held, on a bill to set aside the gift, that fraud and imposition might be inferred from the circumstances and the very nature of the contract, and that the deed of gift was fraudulent and void.

§ 298. In New York and Pennsylvania, in which states it

the fraud of the party who obtained the deed or agreement which constitutes the ground of declaring it invalid; and the fraud is in morals and common sense the same, whether the drunken party has been enticed into drunkenness or becomes the victim of the cunning of another who takes advantage of his mental incapacity." Story Eq. Jur. § 231, note.

- ¹ Cooke v. Clayworth, 18 Ves. 12; Story Eq. Jur. § 231.
- ² Warnock v. Campbell, 10 C. E. Green, 485.
- * Mead v. Coombs, 11 C. E. Green, 178.
- 4 Butler v. Mulvihill, 1 Bligh, 137.
- ⁵ Say v. Barwick, 1 Ves. & Bea. 195.
- ⁶ Phelan v. Gardner, 43 Cal. 306.
- ⁷ Samuel v. Marshall, 3 Leigh, 567.

is provided by statute that inquisitions may issue against persons alleged to be habitual drunkards, and that committees may be appointed for such persons, as in the case of insane persons so found by inquisition, like rules apply to the contracts of habitual drunkards and of insane persons; that is, the court, or the committee of the estate as the bailiff of the court, in either case, being invested with the legal estate in the ward's property, all contracts of the latter made after the issue of the commission, and until the committeeship is discharged, are absolutely void.² And this rule is applied to contracts made by the habitual drunkard in his sober Accordingly where the indorser of a bill of exchange who had prior to its maturity been found an habitual drunkard, by a written instrument made after such finding and before the appointment of a committee and while sober, waived notice of protest, in consequence of which the holder omitted to have notice served, it was held that the waiver was void.8 But as the statute does not provide for a retrospective finding in the case of an inquisition upon an habitual drunkard, the fact that he was such will not, of itself, render contracts and conveyances made by him before inquisition void; and the burden is on the party who attempts to set aside a contract made with one afterwards found to be an habitual drunkard, to show that it was improperly made.4

¹ It is apprehended that like rules will apply in all those states where the statute law provides for inquisitions upon habitual drunkards. See § 41, ante.

² Clark v. Caldwell, 6 Watts, 139; Imhoff v. Witmer, 31 Penn. St. 243.

^{*} Wadsworth v. Sharpsteen, 8 N. Y. 388.

⁴ Haviland, in re, 1 W. N. C. 845.

CHAPTER X.

OF CERTAIN POWERS, RIGHTS, AND DISABILITIES OF INSANE PERSONS.

§ 299. In the last preceding chapter those principles which the law applies in determining the validity of civil acts done by insane persons were considered generally in their application to contracts in which such persons are parties. It now becomes necessary to consider the application of the same principles to certain cases in which either the rights, legal or equitable, of third parties, are to be affected by the determination of the quality or validity of the lunatic's act; or in which a due regard for the interests and well-being of the community requires certain legal rules and safeguards to be established.

SECTION L

AS MAKERS OR INDORSERS OF PROMISSORY NOTES.

§ 300. It is competent to show the insanity of the maker or subsequent indorser of a promissory note in defence to an action brought upon the note. Where, however, an insane

¹ Rice v. Peet, 15 Johns. 503; Lovatt v. Tribe, 8 F. & F. 9; Ellars v. Mossbarger, 9 Brad. App. 122; Hannahs v. Sheldon, 20 Mich. 278; Hicks v. Marshall, 8 Hun, 827; McClain v. Davis, 77 Ind. 419. See Alcock v. Alcock, 3 M. & Gr. 268. In the latter case it was held that, in actions on negotiable paper, the defendant could not prove his insanity or intoxication under a general denial that he made the note or indorsed the bill declared on, but that these defences should be embodied in special pleas. And see also Gore v. Gibson, 13 M. & W. 623; Harrison v. Richardson, 1 M. & Rob. 504. This was an exception to the rule under the old practice that the fact of insanity might be proved in defence to a contract, under the general issue. See Hall v. Wright, E. B. & E. 746; s. c. 29 L. J. N. s. Q. B. 43. Under the new system of pleading in England it is said that it would certainly be proper to include the circumstances

maker of a note gave it to one who discounted it at a bank, and paid over the proceeds to the maker, the bank having no notice of the maker's insanity, it was held, in a subsequent action upon the note brought by the bank against the maker, that the defendant's insanity was no defence to the action, the contract being executed and without fraud. But where a note had been given upon an unexecuted consideration to one who knew of the maker's disability, it was held to be invalid as against the maker, although it had passed into the hands of an innocent purchaser; and it was said that the purchaser of such paper takes it with constructive notice of all legal disabilities, such as infancy, coverture, or unsoundness of mind.2 And it being admitted, in any case, that a note is void as against the maker, on account of his incapacity existing when he signed it, it seems that he cannot be affected with liability even although the note passes into the hands of an indorsee who takes it in good faith and without knowledge of the maker's insanity.8 So it is held that an accommodation indorser of a promissory note, who receives no benefit therefrom either to himself or his estate, may defend against a bona fide holder, on the ground that he was insane at the time of the indorsement; and this, though the holder had, at the time of the transfer to him, no knowledge of the indorser's lunacy.4 It is further held, in an action brought by an indorsee against the maker of a promissory note, that the insanity of the payee and indorser at the time of the indorsement and transfer of the note is a valid defence to the

under which the contract was entered into in the statement of the defence, where lunacy or intoxication is relied on in avoidance of the note, and that the allegation should go to the full disability. Pope, Lun. 314.

¹ Lancaster Co. Nat. Bank v. Moore, 78 Penn. St. 407 (expressions contained in Rogers v. Walker, 6 Penn. St. 371, so far as they conflict with this case, are said to be obiter dicta). In Davis v. Tarver, 35 Ala. 98, it is said that a promissory note given by an insane person has no validity even though its consideration was necessaries furnished him; but although the note is void the price of such necessaries constitutes a legal demand against his estate. See also Seaver v. Phelps, 11 Pick. 304.

² McClain v. Davis, 77 Ind. 419.

^{*} Sentance v. Poole, 3 C. & P. 1.

⁴ Wirebach v. First Nat. Bank of Easton, 97 Penn. St. 548.

action.¹ But in another case the rule was held to be otherwise, if the payee after restoration, or his representatives, had never disaffirmed the indorsement, they being presumably aware of it.²

§ 301. In a case where the defence of insanity was set up in an action upon a promissory note, and it appeared that the note originated in certain business transactions had before the maker became insane, and that after his recovery he received as the result of such former transactions more than enough to indemnify him for the note, it was held that this evidence was admissible, not as tending to ratify or confirm a contract originally void, but to prove that the defendant recognized it as a valid contract, and that he was of sound mind when he executed it.3 Where an insane person under guardianship had in his possession a promissory note payable to himself, and received payment of it from the maker of the note, who had knowledge of the guardianship, it was held, in a subsequent action at law brought by the payee on his restoration to sanity, that the payment was of no effect as a defence to the action, and that the letter of guardianship was conclusive evidence that at the time of payment the ward was of unsound mind in respect of all subjects on which the guardian could act for him. The court said, "If this were not the general principle of law, the situation of the guardian would be extremely unpleasant, and it would be almost impossible to execute the trust." 4 Whether or not the law as laid down in this case is to be taken as sound, it is apprehended that now the defendant would, under like circumstances, have relief, either in equity or by a cross action at law.

SECTION IL

AS PRINCIPALS OF AGENTS OR ATTORNEYS.

§ 302. It was the rule of the common law that insane persons, not being sui juris, were incapable of appointing agents

- ¹ Burke v. Allen, 29 N. H. 106.
- ² Carrier v. Sears, 4 Allen, 836.
- ⁸ Grant v. Thompson, 4 Conn. 203.
- 4 Leonard v. Leonard, 14 Pick. 280 (1832).

or attorneys.1 This rule is still to be accepted in those cases where it appears that the insanity of the principal relates to the subject-matter of the agency, so that he cannot act intelligently in the appointment of the agent.2 Thus it is held that for a valid execution of a power of attorney to convey land, it is essential that the party executing the power should at the time possess sufficient mind and memory to understand the nature of the business he is engaged in, to know the character and location of the property, and the object and effect of the act he is doing; in other words, it is essential that he should recollect that he is the owner of the property mentioned, the place where such property is situated, and that the instrument confers authority upon the agent appointed by it to convey the same.8 On the other hand, the court refused to set aside, unconditionally, a judgment entered under a bond and warrant of attorney executed by the defendant at a time which was subsequently overreached by a judicial finding of his lunacy, it appearing that for several years before the execution of the warrant he had been permitted by his friends to manage his business affairs, and there being no fraud alleged in the execution of, or proceedings upon, the bond and warrant.4

§ 303. Since when one loses the power to bind himself by his own acts his incapacity works a like loss in those on whom

Tarbuck v. Bispham, 2 M. & W. 2; Snyder v. Sponable, 1 Hill, 567; Dexter v. Hall, 15 Wall. 9. "If a principal should become insane, that would or might operate as a suspension or revocation of the authority of his agent during the continuance of the insanity; for the party himself, during his insanity, could not personally do a valid act; and his agent cannot, in virtue of a derivative authority, do any act for and in the name of his principal, which he could not lawfully do for himself." Story on Agency, § 481.

Where the vouchee in a common recovery appeared by attorney, the fact that the caption of the warrant of attorney appeared on the record to have been taken by the Chief Justice of the Common Bench, out of court, was held not conclusive evidence of the mental capacity of the vouchee to make such attorney and suffer such recovery. Hume v. Burton, Ridgway, 16.

- ² See § 270, ante.
- * Hall v. Unger, 4 Sawyer C. C. 672.
- ⁴ Person v. Warren, 14 Barb. 488.

- he has conferred the power to bind him by like acts,1 it follows • in such cases that the insanity of the principal revokes the authority of his agents appointed before insanity supervened.2 Thus A. kept cash with B., a banker, and the balances to his credit were stated from time to time in a pass-book. came a lunatic, but the account continued to be kept with his family, and in the pass-book, the entries in which were in B.'s handwriting, a balance was stated to the credit of A. Parke, B., held that this was not evidence to support a count on an account stated with A., in an action brought by his representative to recover the amount of such balance against B. as the agent of A.⁸ But it is held, in accordance with principles already stated,4 that the mere fact that one has been put under guardianship as an insane person will not warrant the conclusion that an agency previously created by him is thereby terminated, it not appearing that the insanity was of that character which disqualifies its subject from entering into a valid contract.⁵ And although, with the limitations stated, the general rule be admitted that the after-occurring insanity of a principal operates per se as a revocation or suspension of the powers of his agent, an exception to the rule occurs in cases where a consideration has been previously advanced in the transaction, so that the power conferred on the agent by the appointment became coupled with an interest, or where a consideration of value is given by a third person dealing with the agent, and relying on his apparent authority and in ignorance of the principal's incapacity. So it appears to be a
 - ¹ Motley v. Head, 43 Vt. 633; Stead v. Thornton, 3 B. & Adol. 357.
- ² Hill v. Day, 7 Stew. Eq. 150; Bradbury, ex parte, 4 Deacon, 202. In the latter case the principal was found to have been insane three days before the date of the power of attorney under which the agent proved certain debts due his principal, in bankruptcy, and it was held that the power of attorney, being for the benefit of the insane principal, was not vacated by the proceedings in lunacy.
 - * Tarbuck v. Bispham, ubi supra.
 - 4 See §§ 194, 270.
- Motley v. Head, 43 Vt. 633. See Cumming v. Ince, 11 Ad. & El. N. s. Q. B. 112, where the effect of an agreement entered into by the counsel of one under restraint as being insane, though not judicially found so, is discussed.
 - ⁶ Matthiessen & Weichers Refining Co. v. McMahon, 9 Vroom, 536;

sound rule which holds that where an attorney is appointed for a specific purpose he may carry out such purpose, notwithstanding the supervening insanity of his principal; since the act has relation to the time when the authority was given.¹

§ 304. It is held that a power of attorney executed by an insane principal may be avoided by the insane person and his committee upon proceedings in equity instituted for that purpose. And where a bill of sale of bank-stock with power of attorney for its transfer, executed by a lunatic, was so avoided, the bank was held responsible for allowing the transfer to be made under such a power, although there was no actual fraud on the part of the bank; it being held that the bank assumed the risk of the validity of the power, and was liable to the same extent as it would be for a transfer made upon a forged power, or one executed by a feme covert or infant.²

§ 305. It has been said, in the case of the insanity of a principal supervening upon his appointment of an agent, that "the better opinion would seem to be that the fact of the existence of the lunacy must have been previously established by inquisition before it would control the operation of the power." But it would seem difficult to discover any sound reason, either legal or equitable, for the establishment of such a rule, or which should distinguish the given facts from the ordinary case of an act done by an insane party, which act is the direct result of his insanity; the familiar rule in such cases being that the doer's insanity will invalidate the act, and that the existence of such insanity may be proved in any of the methods which the law of evidence permits in the proof of ordinary facts. This view of the law seems to be approved by the weight of modern authority.

Hunt v. Rousmanier's Adm'r, 8 Wheaton, 174. To create a power coupled with an interest, the appointee must take, by virtue of the power, an interest in the thing itself, not merely a right to execute the power. Ibid.

- ¹ Jennings v. Bragg, Cro. Eliz. 446.
- ² Chew v. The Bank of Baltimore, 14 Md. 299.
- * 2 Kent Com. 645 (4th ed.); 1 Bell Com. § 413. See Wallis v. Manhattan Co., 2 Hall, 495; Story on Agency, § 481, note, and cases cited.
- ⁴ Matthiessen & Weichers Refining Co. v. McMahon, 9 Vroom, 536; Davis v. Lane, 10 N. H. 156; Drew v. Munn, L. R. 4 Q. B. D. 661; Hill v. Day, 7 Stew. Eq. 150.

§ 306. It seems that even in those cases where the law, as between sane parties, would imply an agency, insanity existing in the principal will be held to revoke such agency. Thus upon a petition in equity for the partition and sale of lands held in common with other parties by a husband and wife, the wife being insane, the husband signed his own and his wife's name to the petition without disclosing the fact of the insanity, and it was held that although had the wife been sane the law would have implied the husband's authority and her assent to his proceeding, yet, she being insane, no such authority was to be implied, and the sale of the land under the proceedings was void. And where one had agreed to convey land, and the proposed grantee entered into possession, and before the deed was executed the grantor became insane, it was held that a tender of the purchase-money made to the wife of the grantor could avail the grantee nothing, since the wife, under the circumstances, had no authority to receive the money.2

Note. — It is laid down that "an idiot, lunatic, or other person otherwise non compos mentis cannot do any act, as an agent or attorney, binding upon the principal; for they have not any legal discretion or understanding to bestow upon the affairs of others, any more than upon their own." Story on Agency, § 8. And see Pope, Lun. 340; Russell, Merc. Agency, 5; Jarm. Conv. vol. viii. p. 10. The rule thus stated would seem, in the light of modern authority, to be limited in its application to those cases in which the insanity of the agent exists in relation to the subject-matter of his agency.

SECTION III.

AS BANKRUPTS.

§ 307. The authorities agree that a person who is so unsound in mind as to be incapable of managing his affairs can-

¹ Stephens v. Porter, 11 Heisk. 341.

² Boyce v. Pritchett, 6 Dana, 231. Where, by reason of the insanity of an agent, the principal fails to perform a contract entered into with another party, the fact of the agent's insanity being the sole cause of the breach of contract is not an excuse for its non-performance. Higginson v. Weld, 14 Gray, 165.

not commit an act of bankruptcy; 1 and upon the general principle that acts which are the outgrowth of insanity are to be avoided, it follows that such a person cannot become a voluntary bankrupt. 2 Nor can he be forced into involuntary bankruptcy by his creditors, without the consent of his guardian or committee. But if while sane he had committed an act of bankruptcy, he may be made a bankrupt upon a petition in invitum after he has become insane.

§ 308. Considering the impossibility that "any man should be able to say for a lunatic that he is unable to pay his debts and that he desires to have his affairs liquidated," it is held that proceedings for such liquidation cannot be commenced by a next friend in behalf of a lunatic not so found by inquisition. But it seems that in case of a lunatic so found the court having jurisdiction of his person and estate may direct that such proceedings be commenced in his behalf. And the court may make necessary orders in the case of one found insane after being adjudged a bankrupt. Thus where a con-

- ¹ Stamp, ex parte, De Gex (Bank'cy), 345.
- 2 Priddy, ex parte, stated in Cooke B. L. 43; and see Barnesley r. Powell. Ambl. 102; Layton, ex parte, 6 Ves. 434. In the latter case it was held that where one partner was an infant or lunatic there could not be a joint commission of bankruptcy against the others, but that separate commissions must be taken out. But it was provided by St. 6 Geo. IV. c. 16, § 16, that a commission of bankruptcy might be issued against some partners, not including all of the firm; or might be suspended as to one or more partners, without affecting its validity as to the others.
- * Marvin, in re, 1 Dillon, 178; Murphy, in re, 10 Bankr. Reg. 48. In the latter case the creditors of M. filed a petition to have him declared a bankrupt. Upon his default, following an order to show cause, he was adjudged a bankrupt, and an assignee was appointed, to whom M.'s property was turned over, but no dividends of the estate were made. After some time, M. came into court with a petition, supported by affidavits, to set aside the default and adjudication on the ground that at the time the debts due the petitioning creditors were created, as well as at the time of the institution of proceedings and adjudication, and until within a very recent period, he was insane. It was held that the application to set aside the proceedings should be granted, and M. allowed to show cause why he should not be adjudged a bankrupt.
- ⁴ Pratt, in re, 1 Lowell, 96; Weitzel, in re, 7 Biss. 289; Anonymous, 18 Ves. 590 and note.
 - ⁵ Cahen, ex parte, L. R. 10 Ch. D. 183.

tingent interest not embraced in a bankrupt's schedule vested in possession after the bankrupt had become lunatic, an order was made for the payment of the fund into court to the credit of the lunacy, and, afterwards, another order, transferring it to the credit of the insolvency. And it was held, under St. 6 Geo. IV. c. 16, § 122, that the next friend of an insane bankrupt might make the usual affidavits of absence of fraud in order to obtain an allowance for support out of the insolvency, and of the fact of the consent of his creditors to his discharge.

SECTION IV.

AS PARTNERS.

§ 309. It is a settled rule in the English courts that the insanity of a partner does not, ipso facto, work a dissolution of the partnership, nor authorize the sane partners to dissolve the partnership by their mere act. But such insanity is ground for a dissolution upon a bill in equity brought for that purpose by the sane partner or partners, when the disability is such as to render the insane partner incapable of conducting business according to the articles of copartnership. And it would seem that the courts will not ordinarily decree a dissolution when the insanity appears to be merely temporary in its nature, and no substantial injury will be done to the

- ¹ Hinds, in re, L. R. 7 Ch. D. 26.
- ² Roberts, ex parte, 1 Mont. & Chitt. 653.
- * May, ex parte, 2 Mont. Deac. & De G. 381. The next friend of an insane creditor may prove such creditor's claim against the bankrupt debtor. Maltby, ex parte, Rose (Bank'cy), 387. And the mother of such a creditor was admitted to prove on her ex parte application. Oxtoby, ex parte, De Gex (Bank'cy), 453. But the committee of the estate of a lunatic who is a creditor of a liquidating debtor was held to have no power, without the sanction of the Court of Lunacy, to appoint a proxy to vote on behalf of the lunatic in the liquidation proceedings, or to waive any of his rights against the debtor's estate. Wood, ex parte, L. R. 10 Ch. D. 554. See Bradbury, ex parte, 4 Deacon, 202, as cited ante, § 303.
 - 4 Waters v. Taylor, 2 Ves. & Bea. 299.
- Sayers v. Bennet, 1 Cox, 107; Jones v. Noy, 2 Myl. & K. 125. This rule is not unquestioned in the United States. See § 312, post.

other partners by a continuance of the partnership relation.1 In an English case, Sir John Leach, M. R., said: "The insanity of a partner is a ground for the dissolution of the partnership, because it is immediate incapacity; but it may not, in the result, prove to be a ground for dissolution, for the partner may recover from his malady. When a partner, therefore, is affected with insanity, the continuing partner may, if he think fit, make it a ground of dissolution; but in that case I consider, with Lord Kenyon,2 that, in order to make it a ground of dissolution, he must obtain a decree of the court. If he does not apply . . . for a decree, . . . it is to be considered that he is willing to wait to see whether the incapacity of his partner may not prove merely temporary. If he carry on the partnership business in the expectation that his partner may recover from his insanity, so long as he continues the business with that expectation or hope there can be no dissolution." 8 And, later, it was said: "Confirmed and incurable insanity is a ground for dissolving a partnership; but I apprehend that before . . . a partnership shall be dissolved on this ground it must be shown, not merely that the party alleged to be insane is not, for the time being, so capable as he may previously have been of attending to or conducting the business, but that he is really insane." 4

§ 310. Unnecessary delay by one seeking the dissolution of a partnership, on the ground of the insanity of his copartner, may, in equity, bar his right to have the partnership dissolved. Thus where, in a bill filed by the sane partner a long time after the beginning of the lunacy, a retrospective

In a case where the dissolution of a partnership had been decreed in consequence of the lunacy of one of the partners, and large sums of money had been paid into court to the separate account of the lunatic in respect of his share of the capital and profits of the business, the Lord Chancellor, on being subsequently satisfied of the complete recovery of the lunatic, ordered the fund to be paid out to him. Leaf v. Coles, 1 De G. Mac. & G. 417.

¹ Waters v. Taylor, 2 Ves. & Bea. 299; Sadler v. Lee, 6 Beav. 324. See Crawshay v. Collins, 15 Ves. 218.

² See Sayers v. Bennet, 1 Cox, 107.

^{*} Jones v. Noy, 2 Myl. & K. 125.

⁴ Sadler v. Lee, ubi supra.

decree of dissolution was prayed for, Lyndhurst, C., refused such a decree, saying: "Whatever delay has occurred is imputable to the plaintiff himself; it was competent for him to have filed his bill at any moment since the time when his partner first became incapable of attending to the business, but he chose to lie by several years, and having had during that time the benefit of his partner's share of the capital and good-will, he cannot now say that the partnership is to be dissolved as from the time when the insanity commenced." 1 So in an American case, where a bill in equity had been filed by one partner against the other to set aside a bill of sale given by the plaintiff to the defendant in the settlement of partnership accounts between them, upon the ground of the vendor's insanity, and it appeared that the contract was made in 1833; that the plaintiff then received certain property as his share of the partnership property, which share he had used for his own benefit; that he recovered his reason in 1834; and that his bill for relief was not filed until 1845,— Greene, C., held that the plaintiff was barred by his own laches from obtaining the relief sought.2

§ 311. It is said that before granting a decree of dissolution the court will require to be furnished with convincing evidence of the insanity of the party, and that evidence of incapability merely will not justify a decree, since the court proceeds in these cases upon the principle that the insane partner is incapable of receiving from the other notice of dissolution. But in a later case, where, by the articles of copartnership between A. and B., it was agreed that the partnership might be dissolved on either party giving the other six months' notice, and A. gave the required notice, it was held that the notice was effectual notwithstanding the fact that B. was insane when it was given. The court said: "It does not follow because the defendant was insane that he did not know the notice was . . . to dissolve the partnership.

¹ Besch v. Frolich, 1 Phillips, 172. In this case the Chancellor expressed some doubt as to whether the dissolution should not be as from the date of filing the bill, but finally decided that it should take effect from the date of the decree.

Doughty v. Doughty, 3 Halst. Ch. 643. Kirby v. Carr, 3 Y. & Coll. 184.

- ... But whether he knew it or not, I am of opinion that, as a notice was given conformably to the terms of the articles, it was perfectly sufficient, for the party who served it was not bound to find understanding for the party on whom it was served." And later, where the notice of dissolution of a partnership at will was given to the lunatic partner, resident in an asylum, and the purport of the notice explained to him, the notice was held sufficient; and the Master of the Rolls said: "I think the case is like a notice to a tenant to quit, or the notice of a dishonored bill of exchange, or a notice to dissolve at the end of six months, in which case the notice is good, though the party receiving it be lunatic." 2
- § 312. The English rule that the insanity of a partner will not of itself work a dissolution of the copartnership has not passed unquestioned in the courts of the United States. In New Hampshire, Parker, C. J., while admitting its existence, doubted its soundness.8 And in New York it was held by Spencer, J., that the insanity, like the death or bankruptcy of a partner, worked a dissolution of the copartnership.4 So in Tennessee it is said that an inquisition of lunacy found against a member of a partnership dissolves, ipso facto, the partnership. But the English rule appears to be adopted in the courts of New Jersey 6 and Pennsylvania. And in Louisiana it is held that an administrator pro tempore of an interdicted person cannot bind the interdict for the payment of any specified amount in order to effect a liquidation of partnership affairs, since this can only be effected in a suit for the liquidation.8
 - ¹ Robertson v. Lockie, 15 Sim. 285.
 - ² Mellersh v. Keen, 27 Beav. 236.
 - ⁸ See Davis v. Lane, 10 N. H. 156, 161.
 - 4 Griswold v. Waddington, 15 Johns. 57, 82.
 - ⁵ Isler v. Baker, 6 Humph. 85.
 - ⁶ See Doughty v. Doughty, 3 Halst. Ch. 643.
- ⁷ See Uberoth v. Union National Bank, 9 Phil. (N. P.) 63, where it was held that a surviving partner who had become lunatic was, notwithstanding, entitled, by his committee, to the custody and control of the partnership property, and might sue for the recovery of debts due the partnership. It was said that the lunatic and his committee should be joined as plaintiffs in such a suit.
 - ⁸ Espinola v. Blasco, 15 La. Ann. 426.

SECTION V.

AS PARTIES TO THE CONTRACT OF INSURANCE.

§ 313. The rule of law has been heretofore stated that when it appears that any civil act or contract is the direct result of insanity, or affected in its quality by such insanity, such act or contract will be void.1 And it will be seen that when insanity is alleged as an excuse for an unlawful act, and it appears that the act was the direct outgrowth of mental disease overpowering the reason and volition of the subject, the act will be excused.2 These rules have been applied to cases where the one party to an executory contract seeks to avoid the contract on the ground that the other party has done some act which, by the terms of the contract itself, should render it null and void.8 Such cases have most commonly arisen upon those contracts of life insurance in which the policies have provided that the contract should become void if the assured should die by his own hand or by suicide. These cases are now to be considered.

(a.) Self-destruction of the Lunatic Insured may not avoid the Policy.

§ 314. The weight of authority is in favor of the rule that although the policy provide that the contract shall be void if the assured "die by his own hand" or "by suicide," such a policy is not, necessarily, rendered void if the assured commit suicide while insane. In a leading case occurring in

¹ See § 269, ante.

² See ch. xiii. sec. i.

⁸ See § 319, post.

Where a condition of the policy provided that it should be void if the party should "die by his own hand in, or in consequence of, a duel," this was held to include the case of suicide by swallowing arsenic, since the first part of the clause should be separated from the latter part, as the whole taken together would lead to an absurdity. Hartman v. Keystone Ins. Co., 21 Penn. St. 466.

⁸ Horn v. Anglo-Australian & Universal Family Life Ins. Co., 7 Jur. w. s. 673; Easterbrook v. Union Mutual Life Ins. Co., 54 Maine, 224; John Hancock Mutual Life Ins. Co. v. Moore, 84 Mich. 41.

New York it is said: "It is now to be regarded as the settled law of this country and of England that a clause in a policy of life insurance exempting the insurer from liability if the insured 'die by his own hand' has reference to an intelligent or voluntary act, and not to a suicide committed by a party in a state of mental derangement so great that the act of self-destruction is to be regarded as wholly involuntary." This rule rests upon the equitable consideration that the act of self-killing as cause of forfeiture is ordinarily classed in the policy with others involving wrongful conduct, and it is to be inferred that, when caused by insanity, the act is not to be construed as a reason for such forfeiture. The very object of life insurance is to provide for death by disease; and death by his own hand, in the case of one non compos mentis, is the result of disease as much as death by fever or consumption.²

§ 315. In further support of the rule stated the court in New York say: "It is urged that because a person non compos mentis is liable civiliter for torts committed while in a state of insanity, therefore insanity has no effect to qualify this exception in the policy. That conclusion is not a legitimate deduction from the premises. A rational man is liable civiliter for an injury occasioned by an accident, unless it be an inevitable one; and yet no one pretends that the insurer is not liable for a death by accident, whether inevitable or not. Indeed, the liability for death by accident was conceded on the argument. A death by accident, and a death by the party's own hand, when deprived of reason, stand on principle in the same category. In both cases the act was done without a controlling mind. If the insurer is liable in the one case, he should be in the other. If the insured was compelled by duress to take his own life, it will hardly be contended that the insurer could avoid payment. In what consists the difference between the duress of man and the duress of Heaven? Can a man be said to do an act prejudicial to the insured

¹ De Gogorza v. Knickerbocker Life Ins. Co., 65 N. Y. 232. See, to the same effect, Van Zandt v. Mutual Benefit Life Ins. Co., 55 N. Y. 169; Fowler v. Mutual Benefit Life Ins. Co., 4 Lansing, 202; Mutual Life Ins. Co. v. Hunt, 79 N. Y. 541.

² John Hancock Mutual Life Ins. Co. v. Moore, 34 Mich. 41.

when he is compelled to do it by irresistible coercion; and can it make any difference whether this coercion come from the hand of man or the visitation of Providence?" 1

(b.) But Policy will be Void unless the Act be the Direct Result of Insanity.

§ 316. In order to make the contract of insurance binding upon the insurer, the act of self-destruction must have been the result of an insane impulse which irresistibly impelled the assured to take his own life, or of insanity existing in such quality and degree as to render him incapable of forming a rational judgment in respect of the act.2 And the existence of mere moral obliquity, rendering the assured incapable of appreciating the ethical distinctions between right and wrong, will not enable his representatives to enforce a contract which by its terms is to become void upon the suicide of the assured. Thus where the policy contained the usual proviso that if the assured should die by suicide the policy should be void, and the assured killed himself by firing a pistol at his head, the court, by Woodruff, J., held that if, at the time of the killing, the assured was conscious of the act he was committing, intended to take his own life, and was capable of understanding the nature and consequences of the act, the insurers were not liable; that if the act was thus committed, it was immaterial whether he was capable of understanding its moral aspects or of distinguishing between right and wrong; and that if he was not thus conscious or had no such capacity, but acted under an insane delusion, overpowering his understanding and will, or was impelled by an uncontrollable impulse which neither his understanding nor will could resist, the insurers were liable.8

¹ Breasted v. Farmers' Loan & Trust Co., 8 N. Y. 299. See § 327, post.

² Terry v. Insurance Co., 1 Dillon, 403; Van Zandt v. Mutual Benefit Life Ins. Co., 55 N. Y. 169.

Gay v. Union Mutual Life Ins. Co., 9 Blatch. 142. See, to the same effect, Van Zandt v. Mutual Benefit Life Ins. Co., 55 N. Y. 169; Newton v. Mutual Benefit Life Ins. Co., 76 N. Y. 426; Weed v. Mutual Benefit

§ 317. By an extension of the rule stated, based upon sound principle and supported by the weight of authority, it is held that although the assured commit suicide while insane, yet if he understood the nature of the act and intended to take his own life, — in other words, if the act were voluntary, the policy will be avoided. In a leading case in Massachusetts the court say: "In the great majority of cases where reason has lost its legitimate control, and the power of exercising a sound and healthy volition is lost, the mind still retains sufficient power to supply motives and exert a direct and essential control over the actions. . . . In such a case, suicide is the wilful and voluntary act of a person who understands its nature, and intends by it to accomplish the act of self-destruction. It is against risks of this nature — the destruction of life by the voluntary and intentional act of the party assured — that the exception in the proviso is intended to protect the insurers. The moral responsibility for the act does not affect the nature of the hazard."1

Life Ins. Co., 70 N. Y. 561. In the latter case the court said: "If he [the assured] exercised volition, was capable of forming an intention, and with full knowledge that death would follow his action, his mind concurring in the act, he voluntarily destroyed his own life, the policy by its terms became null and void, and of no effect." But see Conn. Mutual Life Ins. Co. v. Groom, 84 Penn. St. 92; American Mutual Life Ins. Co. v. Issett, 74 Penn. St. 176, as cited § 324, post; Nimick v. Insurance Co., 3 Brews. 502, as cited § 325, post.

Dean v. American Life Ins. Co., 4 Allen, 96, 100, 101. Although certain expressions in the opinion in this case seem to countenance a rule that the policy should become void, the assured dying by his own hand, "irrespective of the condition of his mind, as affecting his moral and legal responsibility," it would seem upon a review of the whole case, and the general weight of authority, that the court must be taken to have intended by the words "voluntary act" of the party, an act which it was within the sound volition of the party to have avoided, although he was at the time insane upon some subjects. See §§ 320, 325, 326, post, and comments upon the case in Cooper v. Mass. Mutual Life Ins. Co., 102 Mass. 227. In the latter case it appeared that the act of self-destruction was voluntary, although the plaintiff, in order to take the death out of the proviso, offered to prove that "the assured at the time of committing the act of self-destruction was insane, that he acted under the influence and impulse of insanity, and that his act of self-destruction was the direct result of his insanity." But there was no offer to prove madness of delirium,

§ 318. In the leading English case on this subject the policy contained a proviso that in case "the assured should die by his own hands, or by the hands of justice, or in consequence of a duel," the policy should be void. The assured threw himself into the Thames and was drowned. Upon an issue whether the assured died by his own hands, the jury were instructed that it must appear, in order to avoid the policy, that the assured was conscious of the probable consequences of his act, and did it voluntarily with the express purpose of destroying himself, having at the time sufficient mind and will to destroy himself. The jury found that the assured "voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life, and intending thereby to do so; but at the time of committing the act he was not capable of judging between right and wrong." It was held, Tindal, C. J., dissenting, that the policy was avoided. Where the policy contained the condition that the contract should be void if the assured should "commit suicide," and it was proved that the assured had died from the effect of poison administered by himself, for the purpose of destroying his life, it was held that, in order to avoid the policy, it must be made to appear that the assured could, at the time of the act, so distinguish between right and wrong

or that the act of self-destruction was not the result of the will and intention of the party adapting the means to the end, and contemplating the physical nature and effects of the act. The proviso in the policy was that it should be void if the assured "shall die by suicide." It was held that insanity was not such as to take the case out of the proviso. In Easterbrook v. Union Insurance Co., 54 Maine, 224, the proviso was that the policy should be void if the assured "shall die by his own hand." It appeared that the self-destruction was the result of an irresistible impulse and was not an act of volition. It was held, after very exhaustive consideration of the question, that the policy was not avoided. The court, Kent, J., dissenting, adopted the same interpretation of the case of Dean v. American Life Ins. Co. as that given above. But see St. Louis Mutual Life Ins. Co. v. Graves, 6 Bush, 268, as cited § 328. As to the general proposition stated in the text, see cases cited to § 314, ante.

¹ Borradaile v. Hunter, 5 M. & G. 639; s. c. 12 L. J. N. s. C. P. 2. In this case it was held that the proviso was not limited to acts of felonious suicide. But see § 319, note.

as to be able to understand and appreciate the nature and quality of the act he was doing.1

- § 319. At common law suicide is a felony, but the act of self-destruction committed by one irresponsibly insane is not a crime, and, strictly speaking, is not suicide.² Accordingly, the rule has been laid down that an insurance policy, providing that the contract shall be void if the assured shall die by his own hand, or by "suicide," should be avoided unless it appear that the act of self-destruction was felonious. This rule, which is a restatement in another form of those already laid down, appears to be sanctioned by sound principle and by the tenor of the authorities cited. It was adopted by Tindal, C. J., in his dissenting opinion in the case of Borradaile v. Hunter,⁸ and in Breasted v. Farmers' Loan and
- ¹ Schwabe v. Clift, 2 C. & K. 131; Clift v. Schwabe, 3 C. B. 437. The act of suicide will not of itself create any presumption that the party was insane at the time of the act. See § 223, ante.
- ² "Suicide involves the deliberate termination of one's existence while in the possession and enjoyment of his mental faculties. Self-slaughter by an insane man or a lunatic is not an act of suicide within the meaning of the law." Nelson, C. J., in Breasted v. Farmers' Loan & Trust Co., 4 Hill, 73.
- * 5 M. & G. 639. The substance of this case has already been stated (§ 318, ante). The difference of opinion in the case between Maule, Erskine, and Coltman, JJ., and Tindal, C. J., seems to have arisen out of a mistaken interpretation of the words "criminal responsibility" or "felonious suicide." The jury found that the assured "voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life, and intending thereby to do so; but that at the time of committing the act he was not capable of distinguishing between right and wrong." Applying to this finding those tests which the modern criminal law imposes to determine the quality of the act (see ch. xiii.), the word "voluntarily" must be taken to imply a sane volition, although the assured may have been upon certain subjects, and to a certain degree, insane. words "knowing" and "intending" must be taken as meaning that the act was the result of sane knowledge and intention. This construction of terms renders it necessary to construe the following words of the finding; i. e., that "he [the assured] was not capable of judging between right and wrong," as meaning simply that the assured was incapable of appreciating the moral quality of his act; in other words, that he was "morally insane," merely. And, since "moral insanity" is never an excuse for unlawful acts (see § 10, ante; ch. xiii. sec. iii. (b), post), it follows that, upon the finding of the jury, the court might well have held that the act was

Trust Company 1 it was held that the proviso that the policy should be void if the assured should die by his own hand had reference to the act of criminal self-destruction. So it is held that a similar policy would be void unless the insured was incapable of distinguishing between right and wrong in reference to the act of killing himself so as not to be legally responsible therefor.²

§ 320. A distinction has been attempted to be drawn between the effect of the proviso in a policy that it shall become void if the assured shall "die by his own hand," and the condition that it shall become void if the death be "by suicide;" but it is apprehended that the words "death by his own hand" are words of generic signification and of the most comprehensive character, being sufficiently broad to include every act of self-destruction, however caused, without regard to the moral condition of the mind of the assured, or his legal responsibility for his acts. It follows that it is open to the plaintiff, in a suit upon such a policy, to show that the act of self-destruction was in fact an insane act which should not invalidate the policy. A fortiori, it is obvious that if the proviso is that the policy shall become void upon the "sui-

felonious suicide, which, in accordance with the rule stated in the text and with the principles laid down by Tindal, C. J., in his dissenting opinion, would avoid the policy. But the counsel in argument assumed that the assured was "relieved from all imputation of crime, inasmuch as he could not distinguish between right and wrong" (see p. 645); and the court admitted this assumption as correct (see opinion of Coltman, J., p. 663), although it is also admitted that the assured "had the power to do the act or to abstain from it" (p. 665). Upon the whole case, it would seem that the majority of the court were right in applying the rule that since the act was voluntary the policy should be avoided, but wrong in the assumption that such a voluntary act was not a felonious act. And it would further seem that the Chief Justice, reasoning upon the false assumption that nothing but the felonious act of suicide should avoid the policy.

- ¹ 4 Hill, 73; s. c. on appeal, 8 N. Y. 299. See also Fowler v. Mutual Life Ins. Co., 4 Lansing, 202.
 - ² Merritt v. The Cotton States Life Ins. Co., 55 Ga. 108.
- See remarks of Bigelow, C. J., in Dean v. American Mutual Life Ins. Co., 4 Allen, 96, 98; De Gogorza v. Knickerbocker Life Insurance Co., 65 N. Y. 232.

cide" of the assured, it will be open to the plaintiff to contend that this word is to have its strict technical definition, as meaning an act of criminal self-destruction committed voluntarily, and in the full exercise of reason and discretion.¹

§ 321. In a leading case in New York the effect of a proviso in a policy that it shall become void if the assured "shall die by his own hand or act, sane or insane," is elaborately discussed. The court, by Reynolds, C., say (Earl and Dwight, CC., dissenting): "It can scarcely be doubted that an insurer of the life of a person may by apt language guard himself from liability for all disasters if the exemption does not contravene public policy. He may provide that if the assured shall die of the small-pox or any other specified disease of the body he will not be liable, and there appears to be no reason why he may not guard himself against liability if death results from any disease of the mind. . . . We are asked to decide that the addition of the words 'sane or insane' to the words of a policy, that the insurer shall be excused if the assured 'die by his own hand or act,' means nothing, and it is urged by way of argument that if a madman causes his own death it is no more than a mere accident, and that, therefore, a death caused by mere accident and by one in no way responsible for his acts is in fact the same thing. A death by accident, within the meaning of that term as used in conditions of insurance, is not a death resulting from insanity, and in that connection has no reference to the condition of the mind of the party so dying. It has relation to casualties of a different character by which life is destroyed, and the language of a contract, unless there are special reasons to the contrary, must have a construction according to its common and ordinary meaning, as the majority of mankind would understand it." Accordingly, upon facts tending to show that the assured killed himself by shooting, and that the act was an insane act, an instruction of the court below to the effect that the company would be liable if the act was the involuntary act of one incapable of exercising his will, was disapproved, and the policy was held

¹ Dean v. American Mutual Life Ins. Co., 4 Allen, 96, 98.

to be avoided.¹ The rule thus established seems to rest upon sound reasons, and would appear to be accepted in England.²

§ 322. Since the presumption of law is in favor of the sanity of every person, and insanity is not to be presumed from the mere act of self-destruction, it follows, when the policy of life insurance contains a clause declaring that it shall become null and void in case the assured shall die by his own hand or by suicide, and he afterwards destroys himself, that it is incumbent upon the party seeking to enforce the contract against the insurer to prove that the self-destruction was not the conscious voluntary act of one responsible for his own actions, but the involuntary act of an insane person. And if there be any evidence legally competent tending to sustain the plaintiff's position in such a case, its weight is for the jury to pass upon.

(c.) Contrary and Doubtful Authorities.

§ 323. In a number of reported cases expressions occur which appear to recognize different rules from those stated above, or to require explanation. Thus it has been held that in the case of a policy of life assurance, where there is a condition in the instrument that if the assured shall "die by his own hand" the policy shall be void, the rules are these in case of such a death: (1.) If assured, being in possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches and there can be no re-

De Gogorza v. Knickerbocker Life Ins. Co., 65 N. Y. 232. The rule laid down in this case had previously been indicated in dicta of Rapallo, J., contained in Van Zandt v. Mutual Benefit Life Ins. Co., 55 N. Y. 169.

² See Pope, Lun. 352.

⁸ See § 159, ante.

⁴ See § 226, ante.

Weed v. Mutual Benefit Life Ins. Co., 70 N. Y. 561; Terry v. Insurance Co., 1 Dillon, 403; Gay v. Union Mutual Life Ins. Co., 9 Blatch. 142; Schwabe v. Clift, 2 C. & K. 134.

⁶ Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232; John Hancock Mutual Life Ins. Co. v. Moore, 34 Mich. 41; § 155, ante.

covery. (2.) If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit and when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable. It would seem that the court in this case use the word "voluntary" in a sense differing from that in which it is employed in the cases cited above, since in those cases the word seems to imply that the party, by the exercise of a sound volition existing in him, might have resisted the impulse to suicide. But where, as in the case last cited, a party through defect of reason cannot understand the "nature, consequences, and effect of the act" done, it would seem that the act cannot be the result of a sound volition.² So if the assured is impelled to the act of self-destruction "by an insane impulse which he has not the power to resist," it would seem that the act cannot, in any sense, be voluntary.

§ 324. The court in Pennsylvania, in an elaborate opinion in which the cases are reviewed, lays down a doctrine opposed to that heretofore stated, holding that a policy of insurance which provides that it shall be void if the insured "shall die by suicide" is not forfeited by the insured destroying himself, he being insane at the time, but intending to take his life, and knowing that death would result from the act. The same court in an earlier case had approved the following instruction, which appears to be in accordance with the general rules already stated: "If the assured was not conscious of the act he was committing, but acted under an insane impulse or delusion sufficient to impair his understanding or will, or if his reason was so far overthrown by his mental condition

¹ Mutual Life Ins. Co. v. Terry, 15 Wall. 580.

² Newton v. Mutual Benefit Life Ins. Co., 76 N. Y. 426.

[•] See § 316, ante.

⁴ Connecticut Mutual Life Ins. Co. v. Groom, 84 Penn. St. 92.

⁵ § 816, ante.

that he was incapable of exercising his judgment in regard to the consequences, the defendants are liable." But the court, applying the doctrine afterwards laid down in Connecticut Mutual Life Insurance Company v. Groom, justified a refusal to rule that if the assured "at the time of his death was conscious that his death would follow the discharging of the pistol in his own hands, there can be no recovery, although he was laboring under mental depression or disturbance of mind." It would appear to be difficult to reconcile the rules thus laid down in Pennsylvania with the general principle that the act of a party is to be deemed a sane act unless it is the direct and inevitable outgrowth of such mental disease as destroys the will and reason of the subject.

§ 325. In Nimick v. Insurance Company, which case was tried at nisi prius in the Circuit Court of the United States for the Western District of Pennsylvania, McKennan, J., held that a clause in a life insurance policy which excepted from the risks assumed thereby the death of the assured "by his own hand," operated irrespectively of the condition of mind of the assured respecting his moral and legal responsibility, and was intended to protect the insurers from the act of the insured; and further, that the moral responsibility for the act did not affect the nature of the hazard, the object of the clause being to guard against loss arising from a particular mode of death, and that the causa causans, the motive which guided the will of the party in committing the act, was immaterial as affecting the risk which the insurers intended to except from the policy. So far as this case is intended to establish the rule that the act of self-destruction will avoid the policy, notwithstanding it be the result, merely, of moral perversion influencing the mind of the assured, it is in accord with the authorities; but if, as is apparently the case, the court intend by the causa causans every insane influence

¹ 84 Penn. St. 92.

² American Life Ins. Co. v. Issett, 74 Penn. St. 176.

^{* 3} Brews. 502 (1871). The court in this case founded its opinion upon certain dicta or somewhat obscure expressions of Bigelow, C. J., contained in the opinion in Dean v. American Mutual Life Ins. Co., 4 Allen, 96. For a discussion of that case, see §§ 317, 320, 326.

which may be conceived as determining or subverting the will of the party, it is apprehended that such a rule cannot be supported.

§ 326. In Dean v. American Mutual Life Insurance Company,1 which was a case where the policy contained a proviso by which it was stipulated that it should be void and of no effect if the assured should "die by his own hand," Bigelow, C. J., in delivering the opinion of the court, considered the question whether the language of the policy could be so interpreted as to add to the proviso words of qualification and limitation by which the natural import of the terms used would be so modified and restricted that the case of the party's death by suicide would be taken out of the proviso, and the policy be held valid and binding on the defendant. The Chief Justice said: "The inquiry is, whether the proviso can be so read that the policy was to be void in case the assured should die by his own hand, he being sane when the suicide was committed. If these or equivalent words cannot be added . . . or . . . implied, then it must follow that the language used is to have its legitimate and ordinary signification, by which it is clear that the policy is void. . . . Assuming that the plaintiffs are right in their position, that the words used are not to be interpreted literally, it would seem to be reasonable to hold that they were intended to except from the policy all cases of death by the voluntary act of the assured when his deed of self-destruction was the result of intention, by a person knowing the nature and consequences of the act, although it may have been done under an insane delusion, which rendered the party morally and legally irresponsible, incapable of distinguishing between right and wrong, and which, by disturbing his reason and judgment, impelled him to its commission." These expressions of opinion would seem to be open to criticism as involving an obvious contradiction of terms; for an act which is "the result of intention" committed by one "knowing the nature and consequences of the act" cannot, in the eye of the law, be considered as having been done under the influence of an insane delusion.2 On

^{1 4} Allen, 96.

the other hand, an act committed under an impulse which, by disturbing the party's reason and judgment, rendered him legally irresponsible, cannot be considered as the result of a sane volition. But upon the whole opinion in the case it would seem that the court intended to extend the rule no further than to hold, in accordance with the weight of authority, that suicide committed by one who understood the nature of the act and intended to take his own life, though committed during insanity, avoids a policy which provides that it shall be void if the assured shall die by his own hand.¹

§ 327. In Breasted v. Farmers' Loan and Trust Company 2 it was held that the self-destruction of the assured while insane, and incapable of discerning between right and wrong, was not within the proviso of the policy that it should be void if the assured "should die by his own hand." It might seem, upon the whole case, that the incapacity to distinguish right and wrong, intended by the court, is that which, by an application of the criminal law to the facts of the case, would afford an excuse for the unlawful act of the assured; that is, an incapacity to perceive the legal results and consequences of the act, or that it is malum prohibitum, which is the only incapacity arising out of the party's knowledge of right and wrong which the criminal law recognizes.8 But the case has been considered in Massachusetts as attempting to establish the rule that the right to recover upon the policy may depend upon the knowledge on the part of the assured of the moral quality of the act of self-destruction, and as at variance with the principles established in this class of cases in the latter

§ 328. In the case of St. Louis Mutual Life Insurance Company v. Graves,⁵ it appeared that the assured had killed himself by shooting, and it was contended that "the fatal shot

¹ See § 317, ante, note, and Cooper v. Mass. Mutual Life Ins. Co., 102 Mass. 227.

² 8 N. Y. 299.

⁸ See ch. xiii. sec. iii., (a).

⁴ Cooper v. Mass. Mutual Life Ins. Co., 102 Mass. 227, 229.

⁶ 6 Bush, 268.

was the involuntary offspring of a momentary paroxysm of moral insanity which subjected his will, and impelled the homicide beyond the power of self-control or successful resistance." The court held that to avoid the policy the act of self-destruction must have been voluntary, and disapproved an instruction of the court below to the effect that although the jury might be satisfied that, when the assured did the act, "his intellect was unimpaired, and that he knew it was forbidden both by moral and human law, yet if they believe . . . that if at the instant of the commission of the act his will was subordinated by an uncontrollable passion or emotion causing him to do the act, it was an act of moral insanity." On the question whether the act of self-destruction was an act of "moral insanity," and, if so, whether the act would avoid the policy, the court was equally divided. expressions of opinion in this case are perhaps somewhat obscure; but the court would appear to adopt the general rule, that, in order to avoid the policy, the act of self-destruction on the part of the assured must have been, in contemplation of law, a voluntary act.1

(d.) Rights of Third Parties.

§ 329. It seems that the suicide of a person whose life is insured for the benefit of a third party is no defence to an action brought upon the policy, when there is no stipulation contained in the policy regarding the effect of the suicide of the assured upon the rights of such third party; and, further, that the question whether or not the assured was insane at the time of the act of self-destruction is, in such a case, immaterial.² And where, by the terms of a life policy, the contract was to become void if the assured should commit suicide, and, after assigning the policy, the assured killed himself while of

¹ The court appear to construe the case of Dean v. American Life Ins. Co, 4 Allen, 96 (see § 317), as being opposed to the general rule, and criticise it accordingly.

² Patrick v. Excelsior Life Ins. Co., 67 Barb. 202; Moore v. Wolsey, 1 Jur. N. s. 468; Cook v. Black, 1 Hare, 390; and see Solicitors', &c. Ins. Co. v. Lambe, 2 De G. J. & S. 251; Jackson v. Foster, 5 Jur. N. s. 1247.

unsound mind, it was held that the policy did not become void as against the assignee.1

§ 330. In an English case it appeared that an assurance company had advanced money to the assured on a mortgage of real estate, and on his effecting a policy on his life in their office for the amount of the loan, which policy was deposited with the company as collateral security. The policy contained a condition that if the assured should die by his own hands, by the hands of justice, or by duelling, the contract should be void, except to the extent of any bona fide interest therein, which, at the time of death, should be vested in any other person or persons for a sufficient pecuniary or other consideration. The assured committed suicide while insane, and while the policy was in the hands of the company. It was held that the company and the assured stood in the same position as if the policy had been mortgaged to any third person, that the company came within the exception in the condition, and therefore that the policy was valid to the extent of the mortgage debt due to them at the death of the insured.2

(e.) Payment of Premiums. Affidavits.

§ 331. In a case where the policy contained a clause providing that the contract should become void in case of the non-payment of any premium when due, it was held that the insanity of the insured was not an excuse for non-payment, and did not effect a waiver of the forfeiture as rendering the performance of the condition subsequent contained in the policy impossible of performance, since the payment might as well have been made by any other person as by the assured. Where, after a loss covered by a policy of fire insurance, an affidavit was made by the insured, while insane, of the time, amount, and circumstances of the loss, accompanying proof that a loss had occurred, it was said that insanity would be a sufficient excuse for failure to comply with the condition of the policy requiring such an affidavit; and held, on the facts,

¹ Dufaur v. Professional Life Assurance Co., 25 Beav. 599.

² White v. British Empire Mutual Life Assurance Co., L. R. 7 Eq. 394.

⁸ Wheeler v. Conn. Mutual Life Ins. Co., 16 Hun, 317; s. c. on appeal, 82 N. Y. 543.

that if the affidavit made contained the necessary information as to the time, amount, and circumstances of the loss, it was sufficient though the insured was insane when it was made.¹

SECTION VI.

AS PARTIES TO THE CONTRACT OF MARRIAGE.

(a.) Of the Capacity to Contract.

§ 332. Since the law in modern times considers marriage in the light of a civil contract, it follows that, like all contracts, it will be invalid for want of consent thereto by capable persons; 2 and a party who has not sufficient understanding to be able to make a valid contract respecting property, or to deal with discretion in the ordinary affairs of life, cannot enter into a valid contract of marriage. But to disable one to contract marriage, the insanity must be of such a nature, or of such severity, as to render the party incapable of exercising a rational judgment on the subject in question. It is said: "In no case at the present day is it a mere question whether a party is insane. The point to be established is whether the party is so insane as to be incapable of doing the particular act with understanding and reason. This would be the essential question now when a marriage was alleged to be void by reason of insanity."4

- ¹ Insurance Companies v. Boykin, 12 Wall. 432.
- Turner v. Meyers, 1 Hagg. Cons. 414; Portsmouth v. Portsmouth, id. 355; Parnell v. Parnell, 2 Hagg. Cons. 169; Browning v. Reane, 2 Phill. 69; Harrod v. Harrod, 1 Kay & Johns. 4; Doe v. Roe, Edmonds, 344; Elzey v. Elzey, 1 Houst. 308; Mudway v. Croft, 3 Curt. Ecc. 671; 1 Bishop Mar. & Div. § 127 et seq.; True v. Ranney, 21 N. H. 52. In the latter case an imbecile party had been enticed from New Hampshire into Vermont and there married, and the court in New Hampshire held the marriage invalid even although the lex loci contractus recognized as valid a marriage entered into by one non compos mentis.
- ⁸ Middleborough v. Rochester, 12 Mass. 363; Anonymous, 4 Pick. 32; Cole v. Cole, 5 Sneed, 57.
- 4 Bell, C. J., in Concord v. Rumney, 45 N. H. 423. In Browning v. Reane, 2 Phill. 69, Sir John Nichol said, that, in order to incapacitate the party to make a valid contract of marriage, his insanity must be such as to render him unable to understand the nature of the contract itself, and

§ 333. As in the case of other civil contracts, mere feebleness of mind existing in one of the parties, not amounting to insanity or total loss of understanding, will not vitiate the contract of marriage.¹ Thus upon a libel for divorce for alleged insanity of the wife at the time of the marriage, where the testimony proved only dejection of mind and singularities of conduct on the part of the libellee, the court said that they felt bound to require such evidence of insanity as, in a civil action, would justify a jury in finding the party incapable of making a contract; that anything short of this would open a door to great abuses, and that the fact of a party's being able to go through the marriage ceremony with propriety was prima facie evidence of sufficient understanding to make the contract.² The court refused to set aside the finding of an

unable from mental imbecility to take care of his own person and property. There are expressions in the English cases which seem to intimate that the standard of incapacity, for the purpose of invalidating the contract of marriage, resembles that which would warrant a commission of lunacy rather than that which would avoid an ordinary contract or will, or render the subject criminally irresponsible; and that partial insanity, though not impairing the subject's understanding of the marriage contract, would serve to render the marriage invalid. See Hancock v. Peaty, L. R. 1 P. & D. 335, as cited in note to § 272, ante. So in Turner v. Meyers, 1 Hagg. Cons. 414, Sir William Scott said that, to invalidate the contract, the incapacity must be such as would be held by the common judgment of mankind to affect the subject's general fitness to be trusted with the management of himself and his own concerns. And in Atkinson v. Medford, 46 Maine, 510, it was held that a party contesting the legality of a marriage, because of the alleged insanity of the husband at the time, had no cause of exception to an instruction given to the effect that the same degree of capacity which would enable him to enter into an ordinary civil contract, or to make a valid deed or will, would enable him to contract matrimony. But it is apprehended that — at least in the absence of fraud, and when the other contracting party has notice of the insanity — the ordinary rule, as heretofore stated (§ 270, ante), and as laid ' down in the text, will prevail, and that an application to annul a marriage contract, not vitiated by want of understanding of the parties thereto, will not prevail, unless by consent of both parties. The rule stated in the text is that of the civil law, which upholds marriages entered into by persons partially insane, if the insanity is irrespective of the subject-matter or persons concerned in the contract. Sanchez, de Mat. 1, 8, 23.

¹ Harrod v. Harrod, 1 Kay & J. 4.

² Anonymous, 4 Pick. 32.

inquisition in lunacy which had been obtained with a view to subsequently nullifying the marriage of the alleged lunatic, the jury having found that the party was not an idiot or lunatic, though of weak understanding.¹

§ 334. So deaf and dumb persons may enter into a valid contract of marriage, and the rule is laid down that the presumption of law will be in favor of the validity of such a marriage, and of the party's capacity to contract it; and that the burden of proof will rest upon those who would impeach This rule is founded upon the consideration that the contract of marriage is, in its essence, a consent on the part of the man and woman to cohabit with each other, and with each other only; and therefore it is not essential that all the words of the marriage service to be repeated by the man and woman should be actually said; but the ceremonies required by law, such as the publication of banns and the like, being complied with, when the hands of the parties are joined and a competent magistrate pronounces them to be man and wife, if they understand that by that act they have agreed to cohabit together and with no other person, they are married. court added that, if no question of mental capacity is raised, the objection that a deaf and dumb person did not understand the nature of the contract of marriage into which he had been induced to enter is an objection on the ground of fraud.2

§ 335. In respect of the effect of intoxication of one of the parties to the contract of marriage at the time of the contract, the general rule as heretofore stated would seem to apply, viz. that such a degree of intoxication as will disable the party from understanding the nature and consequences of the act will invalidate the contract. And insanity arising from delirium tremens is cause for avoiding the contract of marriage. But where one of the parties was of grossly drunken

¹ Glen, ex parte, 4 Desauss. 546. See also Slais v. Slais, 9 Mo. App. 96; Elzey v. Elzey, 1 Houst. 308.

² Harrod v. Harrod, 1 Kay & J. 4; and see Swinburne on Marriage, 15.

⁸ See § 295, ante, and cases cited; also Johnston v. Brown, Ferg. Cons. Law Rep. 229.

⁴ Clement v. Mattison, 3 Rich. 93.

habits which affected his mental powers, and was at times subject to delirium, but proper or permanent insanity was not proved, it was held that no sufficient case was made out to impose the necessity of proving the party's capacity to contract marriage.¹

§ 336. Since insanity which does not affect the subject-matter of the contract will not invalidate a marriage, it follows that a valid marriage may, at common law, be entered into by a person ordinarily insane, in a lucid interval. Thus in an English case it appeared that one of the parties had a very weak understanding from his infancy, and, by reason of hard drinking, was at times insane. No commission had been taken out, nor was he constantly mad. He married with previous deliberation and intention, conducted himself with propriety at the time of the marriage, and committed no insane acts about that time. The marriage was sustained as valid.²

(b.) Marriage of Insane Party Void.

§ 337. In respect of the question whether at common law a marriage entered into by one incapable of contracting by

- ¹ Legeyt v. O'Brien, Milward, 325.
- ² Parker v. Parker, 2 Lee Ecc. 382. The rule stated is that of the civil law. Sanchez, de Mat. 1, 8, 16. In England it was formerly the law that no marriage contract entered into by one who had been found lunatic by inquisition should be valid, even though the marriage were celebrated in a lucid interval, the commission not having been superseded. St. 15 Geo. II. c. 30. See opinion of Sir William Scott in Turner v. Meyers, 1 Hagg. Cons. 414. The provision was extended to Ireland by the St. 51 Geo. III. c. 37. But now, under the act 36 & 37 Vict. c. 91 (repealing the above statutes), the English law is that marriage is simply a civil contract, and, like all other civil contracts, will be invalidated by the want of consent of capable persons. See Harford v. Morris, 2 Hagg. Cons. 423, 427, and cases cited infra. But a lunatic after office found being considered as in the custody of the Court of Chancery, it is held that such a marriage will not determine the custody, and that the parties joining in or abetting it will be guilty of a contempt of the court. Ash's Case, Freeman, 259; Anonymous, 2 Eq. Cas. Abr. Cas. LXII.; and see Smart v. Taylor, 9 Mod. 98. If such a marriage is afterwards confirmed, the court will secure the property of the insane ward, in the same manner as is usual in the case of wards of court. Packer v. Wyndham, Prec. in Ch. 412; s. c. 2 Eq. Cas. Abr. 583; Nightingale v. Lockman, Fitzgib. 148; s. c. Mos. 231.

reason of insanity is void ab initio, or whether such a marriage may be ratified by the acts of the party upon his restoration to sanity, the current of authority is not uniform. held in an early case that although a lunatic during his lunacy was incapable of marriage, yet if contracted during lunacy the marriage, like that of an infant, might be made good by subsequent consent.1 In a modern English case it has been held that a petitioner was entitled to a decree of nullity of marriage on the ground of her insanity at the time of the contract; but the decree was postponed in order to give an opportunity to the respondent to show that the petitioner had recovered, which being shown it was said that the decree would not be pronounced unless at her instance.2 In the United States it has been held that a marriage, though invalid at the time thereof, may be ratified and made valid afterwards by any acts and conduct which amount to a recognition of its validity, so that a lunatic, on regaining his reason, may affirm a marriage celebrated while he was insane, and this without any new solemnization.⁸ So where a party while insane was married, and died insane, it was held that although the marriage might have been avoided before the death of the party, in proper proceedings had for that purpose, yet it was a marriage in fact, that the parties were husband and wife, and that the survivor was entitled to a distributive share in the estate of the insane party.4

§ 338. But the prevailing rule on this subject is stated by Chancellor Kent, who, observing that it was "too plain a proposition to be questioned that idiots and lunatics are

¹ Ash's Case, Prec. Ch. 203; s. c. Eq. Abr. 6, 278 (1702); and see 1 Black. Com. 438; Co. Litt. 80 a, note; Cloudesley v. Evans, Prerog. (1763); 1 Sid. 112; Roll. Abr. 357; Parker v. Parker, cited 1 Hagg. Cons. 417; Smart v. Taylor, 9 Mod. 98. Coke says that "the wife of an ideot [or] non compos mentis shall be endowed." 1 Thomas's Coke, 662. But see Jenkins v. Jenkins, 2 Dana, 102.

² Hancock v. Peaty, L. R. 1 P. & D. 335. See § 273, ante, and note.

⁸ Cole v. Cole, 5 Sneed, 57.

⁴ Wiser v. Lockwood, 42 Vt. 720. This decision is based primarily upon the provisions of Rev. Sts. Vt. c. 70, §§ 1-3; but it is said by the court to be in harmony with the common law. Its doctrine is disapproved of by Mr. Bishop. See 1 Bishop Mar. & Div. § 136.

incapable of entering into the matrimonial contract," 1 held that a contract of marriage so entered into being absolutely void, no decree of nullity was in strictness necessary in order to set it aside, although "the fitness and propriety of a judicial decision pronouncing the nullity of such a marriage is very apparent, and is equally conducive to good order and decorum and to the peace and conscience of the party." In North Carolina, Ruffin, C. J., in a suit for nullity of marriage brought by the guardian of a lunatic, in her name, said: "We have no doubt that by the common law of England, ... as far as can be traced for four or five centuries, a marriage of a lunatic is void, and must be pronounced so by every court to which, and every form in which, the subject can be presented." And he remarks that although, in a case of alleged insanity at the time of the marriage, subsequent acquiescence during long or frequent periods of undoubtedly restored reason may be cogent proof of competent understanding at the time of the marriage, yet, assuming lunacy then to have existed, the rule that, a contract of marriage being void, nothing can render it valid "seems to be sustained by the consideration that marriage is a peculiar contract."8

- 1 But see § 337, ante.
- 2 Wightman r. Wightman, 4 Johns. Ch. 343. To the same effect see Rawdon v. Rawdon, 28 Ala. 565. In the latter case it was held that a lapse of twenty-two years after the discovery of the alleged insanity was a bar to relief in a suit for nullity, such suit being considered in equity as brought to enforce a stale demand. In New York, under the statute (Rev. Sts. (7th ed.) vol. iii. ch. viii. tit. i. art. i. § 4), the marriage of a lunatic is to be regarded as valid until duly annulled by a court of equity. Such a marriage cannot be impeached collaterally, as in an action brought for the price of necessaries furnished to the insane wife. Stuckey v. Mathes, 24 Hun, 461. But such a marriage, not followed by cohabitation, is held not to be within the purview of the statute. Jaques v. Public Administrator, 1 Bradf. Surr. 499.

In Massachusetts, on the other hand, it is provided by statute that "every marriage solemnized within this commonwealth... when either party was insane or an idiot shall be void without a decree of divorce or other legal process." Pub. Sts. Mass. c. 145, § 7.

⁸ Crump v. Morgan, 8 Ired. Eq. 91. See also Johnson v. Kincade, 2 Ired. Eq. 470. The decree of nullity in the case of Crump v. Morgan was framed by the Chief Justice, and recited that the plaintiff was in fact a "lunatic and person of unsound mind and incapable from mental

§ 339. In Kentucky it has been held that, since a person of unsound mind cannot be married, the performance of a marriage ceremony between a sane person and a lunatic, and continual cohabitation till the death of the latter, will not constitute a legal marriage, nor give the survivor a claim to dower or curtesy in the lunatic's estate. And the court add that it is unnecessary in order to destroy the claim for dower in such a case that there should have been a decree of nullity pronounced during the lunatic husband's lifetime, but that his heirs may incidentally impeach the marriage, as defendants, in a suit brought in chancery for dower or distribution.¹ The view of the law as laid down in these cases appears to be generally accepted by the American courts,2 as well as by the text-writers and the best English authorities, it being the doctrine of the ecclesiastical courts that, in case of the insanity of one of the contracting parties, the disability does not dissolve a contract already made, but renders the parties incapable of contracting at all; it does not put asunder those who are joined together, but previously hinders the junction; and if any persons under this incapacity come together it is a meretricious and not a matrimonial union, and therefore no sentence of avoidance is necessary.4

§ 340. Independently of the general question whether the marriage of an incapable party is void ab initio, it is held that if one of the parties to a marriage contract is insane at the time of the marriage; which fact is fraudulently concealed

a contract of so high a nature as that of the said marriage. . . . And the court doth further declare that the said plaintiff hath, ever since the said marriage, in fact, continued to be, and is now, lunatic and of unsound mind, and incapable of consenting to the said marriage, and thereby confirming the same, even if such subsequent consent could, in law, confirm and make valid the said marriage."

- ¹ Jenkins v. Jenkins, 2 Dana, 102.
- ² Waymire v. Jetmore, 22 Ohio St. 271; Foster v. Means, Speers, 569; Powell v. Powell, 18 Kan. 371.
- 8 2 Kent Com. 40, 41; 1 Bishop Mar. & Div. § 136; Paynter, Mar. & Div. 157; Shelf. Lun. 446 and cases cited; Pope, Lun. 247.
- ⁴ Per Sir John Nichol, in Elliott v. Gurr, 2 Phill. 19; Browning v. Reane, id. 69; Turner v. Meyers, 1 Hagg. Cons. 414; Portsmouth's Case, cited in Shelf. Lun. 446.

from the other party, the marriage will be invalid, since the fraud vitiates the contract.¹ But it is held that occasional paroxysms of hereditary insanity in one party occurring before marriage will not furnish a ground for divorce, although their occurrence was, at the time of the marriage, unknown to the other party.² At common law insanity supervening after marriage is not a reason for divorce.⁸

(c.) Insane Violations of the Marriage Contract Excused.

- § 341. It may be stated as a general rule that insanity is a full defence for all acts or disabilities arising therefrom, which, if done or suffered by a sane person, would furnish a legal ground for divorce in favor of the other party.⁴ Thus it is held that neither impotence, nor extreme cruelty,⁵ nor desertion,⁶ if these be caused by insanity, are grounds for a dissolution of the marriage contract. The same rule is applied to cases where sexual intercourse has been had between the insane person and a stranger, it being said that, as in the case of a criminal prosecution for similar acts, a criminal intent must appear in order to justify a dissolution of the marriage, and that, unless such an intent be proved, the act is not to be considered as adulterous.⁷ This rule rests upon the consideration that, in such cases, there is wanting the consenting will indispensable to give the act a criminal
- 1 Keyes v. Keyes, 22 N. H. 553. In this case the court said that it was unnecessary to inquire what the rule would be had the sane party been aware of the insanity of the other. But see Benton v. Benton, 1 Day (Conn.), 111. In Mississippi a divorce may be granted in favor of a party, if the other party was insane or an idiot at the time of the marriage, and the party applying did not know of such insanity or idiocy; but such a divorce will not render the children of the parties illegitimate. Rev. Code Miss. (1871) § 1770.
- ² Hamaker v. Hamaker, 18 Ill. 137. See Smith v. Smith, 47 Miss. 211; Ward v. Dulaney, 23 Miss. 410.
- ⁸ 1 Bishop Mar. & Div. § 130; Parnell v. Parnell, 2 Hagg. Cons. § 169; Smith v. Smith, 47 Miss. 211; Curry v. Curry, 1 Wilson (Ind.), 236.
 - ⁴ See opinion of Redfield, C. J., in Nichols v. Nichols, 31 Vt. 328.
 - ⁵ Powell v. Powell, 18 Kan. 371.
 - ⁶ Nichols v. Nichols, ubi supra.
- ⁷ 1 Bishop Mar. & Div. § 712; Nichols v. Nichols. ubi supra; Broadstreet v. Broadstreet, 7 Mass. 474; Wray v. Wray, 19 Ala. 522.

quality. If the sexual connection be accomplished by force or fraud, "no one could pretend that it formed any ground of dissolving the bonds of matrimony. And insanity is even more an excuse, if possible, than force or fraud. It not only is not the act of a responsible agent, but in some sense it might fairly be regarded as superinduced by the consent or connivance of the husband, since he has the right, and is bound in duty, to restrain the wife, when bereft of reason and the power of self-control, from the commission of all unlawful acts." 1

¹ Opinion by Redfield, C. J., in Nichols v. Nichols, 31 Vt. 328. A contrary view of the law on this subject was taken in Matchin v. Matchin, 6 Penn. St. 332. Pronouncing the opinion of the court in this case, Gibson, C. J., said: "A wife's insanity, though so absolute as to have effaced from her mind the first lines of conjugal duty, would not be a defence to a libel for adultery, though it would be a defence to an indictment for it. . . . To say the least, adultery committed under the irresistible impulse of that morbid activity of the sexual propensity which is called nymphomania, or more recently erotic mania, would certainly be ground for . divorce, though not of indictment. The great end of matrimony is not the comfort or convenience of the immediate parties, though these are necessarily embarked in it, but the procreation of a progeny having a legal title to maintenance by the father; and the reciprocal taking " of the parties "is no more than ancillary to the principal purpose of it. The civil rights created by them may be forfeited by the misconduct of either party; but though the forfeiture can be incurred, so far as the parties themselves are concerned, only by a responsible agent, it follows not that those rights must not give way without it to public policy, and the paramount purposes of the marriage, — the procreation and protection of legitimate children, the institution of families, and the creation of natural relations among mankind." This being a suit for divorce brought by the husband against his wife, the learned judge adds that "insanity might be a bar to a divorce brought" on similar grounds "at the suit of the wife when it would not be at the suit of the husband," for the reasons of public policy stated in the passage cited above. The view of the law thus expressed by Gibson, C. J., has not, it is believed, been adopted elsewhere. and it has been sharply criticised. See Nichols v. Nichols, ubi supra; 1 Bishop Mar. & Div. § 712; Wray v. Wray, 19 Ala. 522. In the latter case it is said that the doctrine of Matchin v. Matchin, if carried to its legitimate conclusion, "would entitle the husband to a divorce if the wife should become unfruitful from disease, or if another man should obtain access to her by force or fraud."

SECTION VII.

POWER TO CHOOSE SETTLEMENT.

- § 342. A person who has not mental capacity sufficient to enable him to choose a domicile intelligently, and who has not at the same time, in any place, estate sufficient to give him a settlement, cannot acquire a settlement by mere residence. Such a person will follow the settlement of his father or legal guardian, as well after he comes to full age as before, and his domicile may be changed by the direction or with the assent of his guardian, express or implied. The test is to be applied in such cases by inquiring whether the person has capacity sufficient to choose a domicile intelligently, since, even if it were admitted that idiots and persons wholly bereft of understanding are incapable of changing their domicile, it would not follow that the same incapacity would attach to all degrees of mental incapacity. There are those, and not a few, who may be unable to manage their property and other concerns with good judgment and discretion, and may need guardians to protect them from imposition, and who nevertheless have sufficient understanding to choose their homes.2
- Upton v. Northbridge, 15 Mass. 237; Holyoke v. Haskins, 5 Pick. 20; and see Robert's Succession, 2 Rob. La. 427. Insanity occurring after its subject has become an inhabitant of a town will not prevent his acquiring a settlement therein, if his residence there continued during such time as would give him a settlement if he were sane, since his domicile, having been once established, is presumed to remain unchanged. Chicopee v. Whately, 6 Allen, 508. And if an insane person be sent to an insane hospital by the municipal officers of the town in which he has established his residence, he does not thereby lose his residence, but it continues during his confinement in the hospital. Pittsfield v. Detroit, 53 Maine, 442.
- ² Per Wilde, J., in Holyoke v. Haskins, 5 Pick. 26. See also Townsend v. Pepperell, 99 Mass. 40; Concord v. Rumney, 45 N. H. 423, as cited ante, § 270.

It is held that the authorities of a municipality in deciding the question of a party's insanity, their being involved in this jurisdiction over the question of his settlement, act judicially, and the copy of their record is the legal evidence of their judgment. Eastport v. Belfast, 40 Maine, 262; Same v. East Machias, 35 Maine, 402.

§ 343. The rule on this subject, so far as it declares the incompetence of one who cannot select a domicile intelligently to choose a settlement, was thus laid down by Lord Tenterden in a case involving the question of the capacity of a pauper idiot: "A child unemancipated follows the settlement of his father; and the general rule is that until he reaches twentyone the child is not emancipated unless he becomes the head of another family, or does some act to gain a settlement; but if, after twenty-one, he separates himself from his father's family, he is emancipated. Why is twenty-one the period thus fixed by law? Because at that age the party is presumed in law to be competent to take the management of his Here the pauper never was, and never will be, own affairs. competent to do so. The reason, therefore, for which that period is fixed upon in other cases wholly fails in this." And it is further held, if one at the time he becomes of age is of unsound mind, and remains in that state to his death, that the incapacity of minority, never having been followed by adult capacity, will continue to confer upon the father the right of choice in the matter of domicile for his son, and a change of domicile by the father will usually produce a similar change of domicile of the son.2

SECTION VIII.

OF INSANE WITNESSES.

- § 344. It is an established rule of law that an insane person is competent to be a witness if he have sufficient understanding to apprehend the obligation of an oath, to enable him to give a correct account of those matters, relating to the issue, which he has seen or heard. And the rule, sometimes stated,
 - ¹ Rex v. Much Cowarne, 2 B. & Ad. 861.
- ² Sharpe v. Crispin, L. R. 1 P. & D. 611. See also Bempde v. Johnson, 3 Ves. 201; Hepburn v. Skirving, 9 W. R. 761; Regina v. Whitby, L. R. 5 Q. B. 325.
- * 1 Greenl. Ev. § 365; Taylor on Evidence, 1193; 1 Whart. Cr. Law, § 752; Regina v. Hill, 5 Cox C. C. 259; s. c. 2 Den. Cr. C. 255; Evans v. Hettich, 7 Wheat. 453; Hartford v. Palmer, 16 Johns. 143; Cannady v. Lynch, 27 Minn. 435; Coleman v. Commonwealth, 25 Gratt. 865;

that a witness shown to be non compos mentis or deranged in mind is incompetent to testify, is, in the light of the modern authorities, to be applied only in cases where want of understanding on all subjects, or on the subject which is under inquiry, is shown to exist.

§ 345. Applying the general rule that the effect of the insanity alleged upon the act done or to be done is always for the determination of the court as being a matter of law,² it follows that the question whether the witness has sufficient understanding to render him competent is to be decided by the court upon examination of himself and of other witnesses who can speak as to the nature and extent of his insanity, the credibility of the evidence of the insane witness being for the determination of the jury.⁸ This rule is applied in

Campbell v. The State, 23 Ala. 44; Commonwealth v. Reynolds, cited 10 Allen, 64; Kendall v. May, 10 Allen, 59; Leggate v. Clark, 111 Mass. 308. In Kendall v. May, supra, it was held, under a statute permitting the parties to a civil action to testify therein, except that when one party "is shown to the court to be insane the other party shall not be admitted to testify in his own favor," that a party might be admitted to testify in his own favor although the adverse party was insane, if it appeared to the court that the insane party was, in fact, competent to testify. But in Little v. Little, 13 Gray, 264, on the hearing of a libel for divorce by reason of the libellee's insanity, the court, applying the statute, refused to admit the libellant to testify, the question of the libellee's competency in fact to testify not appearing to have been raised.

A deaf and dumb person capable of relating facts correctly by signs may give evidence by signs, through the medium of an interpreter, though it appear that such person can read and write, and communicate ideas imperfectly by writing. State v. De Wolf, 8 Conn. 93; Regina v. Whitehead, L. R. 1 C. C. R. 33; Ruston's Case, Leach Cr. Law, 408; Taylor on Evidence, 1194. If the witness can write, this method of taking his testimony is to be preferred. Morrison v. Leonard, 3 C. & P. 127.

- ¹ See Livingston v. Kiersted, 10 Johns. 362.
- ² See § 151, ante.
- Regina v. Hill, 5 Cox C. C. 259; s. c. 2 Den. Cr. Cas. 255; Hartford v. Palmer, 16 Johns. 143 (applying the rule to the case of an intoxicated witness); Holcomb v. Holcomb, 28 Conn. 177; Grant v. Thompson, 4 Conn. 208; Coleman v. Commonwealth, 25 Gratt. 865; James v. Stonebank, Coxe (N. J.), 227; Carpenter v. Dame, 10 Ind. 125; People v. New York Hospital, 3 Abb. N. C. 229. In the latter case the view of the law taken in Robinson v. Dana, 16 Vt. 474, contrary to the rule stated in the text, is pronounced "clearly unsound." The case of Robinson v. Dana

cases where it is sought to give effect to the affidavits or depositions of persons alleged to be insane. Thus, before the affidavit of a person suffering from mental delusions and in confinement in a lunatic asylum can be received, his mental condition must first be ascertained by preliminary inquiry before the court, or some person specially delegated by the court for that purpose. So it was held that a commission might be issued to take the testimony of one committed to a lunatic asylum in another state on the ground of insanity, but that, upon the trial of the action, the return thereto must be first submitted to the presiding justice, who should determine, on an examination of the answers therein contained and of such witnesses having knowledge of the subject as might be produced before him, whether or not the mental condition of the witness was such as to render his testimony admissible in evidence.2

§ 346. Under a statute disqualifying insane or intoxicated persons from being witnesses,³ it was held that such disqualification only applied to such persons when the intoxication or unsoundness was of such kind or degree as would render the witness incompetent at common law.⁴ And where a witness on cross-examination declared himself unable to answer questions put to him on the ground that his memory at times

appears to be unsupported by the authorities. Although the question of the competency of a witness alleged to be insane is exclusively for the court, the ordinary rules of evidence are applied to its determination. Thus an inquisition of lunacy found against a witness is prima facie evidence of his incompetency to testify. And this is so although his testimony is offered against one who was not a party to the proceedings in lunacy. Hoyt v. Adee, 3 Lansing, 173,

Habeas corpus ad testificandum, or other appropriate process, may be obtained for the purpose of bringing into court as a witness an insane person kept in confinement, upon satisfactory proof being furnished to the court that he is not a daugerous lunatic, and that he is in a fit state to be brought in. Fennell v. Tait, 1 C. M. & R. 584; s. c. 5 Tyrw. 218.

- ¹ Spittle v. Walton, L. R. 11 Eq. 420; s. c. 40 L. J. N. s. Ch. 368. In this case, therefore, an affidavit sworn by a person in a lunatic asylum, without any notice in the jurat of the circumstances under which, or the place where, it was sworn, was ordered to be taken off the files.
 - ² Hand v. Burrows, 23 Hun, 330.
 - ⁸ Gen. Sts. Minn. 1878, c. 73, § 9, subd. 1.
 - 4 Cannady v. Lynch, 27 Minn. 435.

failed him, in consequence of mental injuries resulting from a sunstroke, the court refused to order the testimony of the witness to be stricken out. In an action by one who had been confined in a lunatic asylum while insane, but had regained her sanity, brought to recover damages for alleged ill-treatment suffered in the asylum, it was held, after careful consideration, that the plaintiff was competent to testify as to events occurring during her insanity, provided that the facts testified to were objectively demonstrable, and constituted a basis from which to begin such testimony.²

§ 347. Upon the question whether, when the competency of a witness is attacked upon the ground of his alleged insanity, and the court decides in favor of his competency, the evidence adduced to the court may afterwards be submitted to the jury for the purpose of affecting his credibility, there is some conflict of authority; but the better opinion seems to be against the admission of such evidence.8 Nor do the authorities agree upon the question whether it is proper to impeach the credibility of a witness by introducing any evidence of his incapacity, existing either at the time of trial or at the time when the circumstances to which he testifies occurred. In Indiana the question was considered a doubtful one, the court having on the preliminary inquiry pronounced the witness competent.4 In Ohio it is held inadmissible to impeach the credibility of a competent witness by proof that he is not possessed of ordinary intelligence; 5 and in Pennsylvania

¹ Lewis v. Eagle Insurance Co., 10 Gray, 508. The court distinguish this case from Kissam v. Forest, 25 Wend. 651, where a witness died before his examination was completed.

People v. New York Hospital, 3 Abb. N. C. 229. See also Sarbach v. Jones, 20 Kan. 497, where it was held that one who had, at some time prior to the trial at which he was called upon to testify, been declared insane, and placed under guardianship, and thereafter and before being introduced as a witness had been duly adjudged sane and released from guardianship, was a competent witness, and that such a witness, after his restoration to sanity, might testify respecting facts which occurred during the period he was under guardianship; and that it was for the jury to judge of the credit that should be given to his testimony.

⁸ Campbell v. The State, 23 Ala. 44.

⁴ Carpenter v. Dame, 10 Ind. 125.

⁵ Bell v. Rinner, 10 Ohio St. 45.

evidence offered to show the general character of a witness for drunkenness was excluded.¹ But it is held in Connecticut that the question whether a witness, sane at the time he testifies, was insane at the time of the transaction with regard to which he testifies, goes to the credibility of his testimony and not to his competency, and is therefore a subject for evidence to the jury, to be adduced by the opposing party with his other evidence; and, further, that the fact of his insanity at the time of the transaction is to be proved in the same manner as insanity in any other case, and evidence of his insanity before and after the transaction is admissible for the purpose.² Evidence that a witness who had been examined had been of imbecile mind and memory was held to be admissible to affect his credibility, although not offered as an objection to his competency before he was sworn.³

Note. — Where an attesting witness to a deed, will, or other instrument becomes insane, his signature as witness may be proved by evidence of his handwriting, as in the case of a deceased witness. Bennett v. Taylor, 9 Ves. 381; Currie v. Child, 3 Camp. 283. Where a witness is so insane at the time of trial as to be incompetent to testify, it would seem that his deposition, previously made in the same matter, while sane, may be received, although not taken de bene esse. In a criminal case, such a deposition of a witness taken before the committing magistrate has been received. Regina v. Marshall, 1 Car. & M. 147. So orders have been made that parties may be at liberty to read the depositions of any witnesses examined in a cause who shall be proved to the satisfaction of the court to have been of sound mind at the time of their examination in the cause, but to be at the time of trial mentally incapable of giving testimony. Jones v. Jones, 1 Cox, 184; Murley v. Templeman, cited Shelf. Lun. 495. The judges of the Court of King's Bench were divided in opinion upon the question whether the examination of a pauper respecting the place of his settlement, taken by two justices of the peace while he was sane, could be given in evidence after he had become insane. Rex v. Eriswell, 3 T. R. 707.

¹ Brown v. M'Ilvaine, 10 S. & R. 282. But see Bricker v. Lightner, 40 Penn. St. 199.

² Holcomb v. Holcomb, 28 Conn. 177.

^{*} Rivara v. Ghio, 3 E. D. Smith, 264.

SECTION IX.

OF THE INSANE AS PUBLIC OFFICERS.

§ 348. Under the Constitution of England it is considered that when the king has, through mental incapacity, become incapable of administering the executive functions with which he is intrusted, a regent may be appointed by parliament to administer such functions during the continuance of the king's disability. Thus, in 1454 a regent was appointed on account of the derangement and mental imbecility of King Henry VI. This subject was much considered upon the occurrence of the insanity of George III. A committee of the two houses was appointed by parliament to examine into the mental condition of the king, and, with the aid of the king's physicians, report thereon; and it appearing that the king was insane, it was reported by the committee that, for the purpose of providing for the exercise of the royal authority during the continuance of his majesty's illness in such manner as the circumstances and the urgent concerns of the nation required, it was expedient that his royal highness the Prince of Wales, being resident within the realm, should be empowered to exercise and administer the royal authority, according to the laws and constitution of the United Kingdom, in the name and on behalf of his majesty, and under the style and title of Regent of the Kingdom, and to use, execute, and perform, in the name and on the behalf of his majesty, all authorities, prerogative acts of government, and administration of the same which belong to the king of the realm to use, execute, and perform, according to the laws thereof. It is provided by the Constitution of the United States that, in case of the inability of the president to discharge the powers and duties of his office, the same shall devolve on the vice-

¹ See Journal, House of Lords, Dec. 8, 1788, Dec. 12, 1788, Dec. 17, 1788, Jan. 4, 1811; Journal, House of Commons, Dec. 8, 1788, Dec. 12, 1788, Jan. 2, 1811; Parliamentary Debates, 1788–1789, March, 1810; Cobbett's Parl. Deb. vol. xviii.; Statutes 51 Geo. III. c. 1, 52 Geo. III. cc. 6, 7, 8, 1 Wm. IV. c. 2.

president; and that the congress may by law provide for the case of the inability of the president and vice-president, declaring what officer shall then act as president. But the statute law has not defined any means by which the fact of disability existing in any particular case shall be ascertained and certified to congress.

§ 349. It is said that, in England, persons deaf and dumb, or idiots or madmen, are disqualified for being chosen members of parliament,2 but that lunatics in lucid intervals are eligible, since the lunacy may never return; but if it should, and be duly reported to the House of Commons, there is precedent for declaring the lunatic's seat vacant.8 But the practice of the house in such cases is not to discharge a member on account of his being afflicted with a curable disease, but to grant or refuse a new writ of election, according as the member's incapacity appears to be permanent or temporary.4 Where lunacy supervenes for the first time after the election, it seems that a petition may be presented by any of the electors, on behalf of themselves and the rest, praying the issue of a new writ. The petition will not be granted as of course, but the house will appoint a committee to inquire into the nature of the alleged incapacity. It is said that in cases since the reign of Henry VIII. the house has uniformly adopted this method of proceeding.5 The action of the House of Commons in such cases would seem to be founded upon the consideration that the several constituencies, under the laws and constitution of the kingdom, have a right to intelligent representation in parliament, of which right the confirmed and permanent insanity of a member will work a deprivation.6 Under that provision of the Constitution of the United States which declares that each house of congress

¹ Constitution of the United States, art. ii. sec. 1.

² Whitlock's Notes on the King's Writ, 641.

^{*} Grampound's Case (1556), D'Ewes' Journal, 126; May, Parl. Practice, 32.

⁴ Commons' Journal, April 2, 1811.

⁵ Ibid., and App. 687; Brooke's Abr. tit. Parliament, sec. 7; Pope, Lun. 847.

[•] Wexford Petition, Shelf. Lun. 490.

shall be the judge of the qualifications of its own members,¹ it would seem that this power cannot be construed to authorize either house to declare a seat vacant by reason of its incumbent's insanity, since the clause is to be taken as referring to those qualifications in respect of age, residence, and citizenship which the Constitution elsewhere prescribes in fixing the eligibility of senators and representatives.²

§ 350. It is believed that at common law the insanity of one holding a public office by virtue of an irrevocable appointment, or an appointment which, though revocable, is not revoked, will not of itself render such office vacant. Thus it is said that one non compos mentis ought not to sit as a judge; but, nevertheless, should such a case occur, that the matters of record taken before him would be good. So under the ecclesiastical law if a beneficed clergyman becomes of unsound mind and incapable of performing his duties, his living will not be vacated, but his bishop will provide for the service of the church by appointing a curate, to be paid out of the profits of the living, and sequestrators will be chosen to collect the tithes during the period of the incumbent's incapacity.4

Note. — (1.) Insane Persons as Jurors. Since the question of the competency of jurors, whether raised before trial commenced or afterwards, is for the determination of the court, which may, in its discretion, withdraw a civil cause from the jury at any stage before verdict and order a new trial, it follows that in civil causes the insanity of a juror manifesting itself during trial will justify the court in so withdrawing the cause. And even in a capital case it is held that insanity of one of the jurors is a good cause for discharging the jury without the consent of the prisoner or his counsel. See United States r. Haskell, 4 Wash. C. C. 402; Commonwealth v. Cook, 6 S. & R. 576, 587.

Note. — (2.) Insane Persons as Voters. In England it is con-

¹ Art. i. sec. 5. ² Art. i. secs. 2, 3.

Shelf. Lun. 493 and authorities cited; and see State v. Pidgeon, 8 Blackf. 132; State ex rel. O'Neale v. Clinton, 5 Nev. 329. "A person is practically disqualified for being a judge by insanity. Still it seems that ministerial acts done by a judge who was a lunatic have been held good." Pope, Lun. 315, citing Bryd. 65, 85; Brooke's Abr. 258, pl. 7; Mirror of Justices, ch. ii. sec. 2.

⁴ Burn's Ecc. Law, vol. iii. 339, 340, vol. iv. 8; Pace's Case, Dyer, 803 (a), n.

sidered that idiots and lunatics are incapable of voting for members of parliament, although they possess the other necessary qualifications; but if during a lucid interval an insane person be capable of voting intelligently, his vote is not to be rejected. Shelf. Lun. 491, 492 and authorities cited. In the United States the statutes generally exclude from the class of voters persons "under guardianship" (see Pub. Sts. Mass. ch. 6, § 1), or provide that persons duly found non compos mentis shall be considered as civilly dead; in which case, of course, they cannot exercise the right of suffrage; but it is apprehended that in the case of one in fact insane, though not so found by the competent tribunal, the law affords no means and vests no authority in any tribunal to reject the ballot of such a person or to declare it ineffectual.

SECTION X.

OF INSANE PERSONS AS FIDUCIARIES.

§ 351. It is believed that the rules of the modern law, which in every case of alleged insanity inquires whether the special act in controversy was the result or outgrowth of the insanity, and pronounces the act valid or invalid accordingly, are to be applied to those cases in which the act to be inquired into was done by virtue of powers delegated to the doer of the act, whether by the appointment in pais by one standing in the relation of principal to a chosen agent,2 or whether the power be created through an appointment by matter of record; as in the case of guardians, executors, administrators, or trustees appointed by the court. Thus though it is said that a lunatic cannot be guardian or next friend of another, since "one who cannot govern himself will be unable to manage another or his concerns," 8 it is apprehended that the legal disqualification will not apply to those cases of partial insanity, or monomania, in which the unsoundness exists only in respect to one clearly defined subject, and does not in fact disqualify the party from the performance of business acts either in

¹ See §§ 270-272, ante.

² See Note following § 306.

⁸ Co. Litt. 88 b; 2 Fonb. Eq. 249, note; Brydges, ex parte, cited in Pope, Lun. 345. So it is said that a lunatic cannot be an arbitrator. Pope, Lun. 342. But the rule is to be taken with the qualification stated above.

behalf of himself or of other persons. But the disqualification is, of course, absolute as to insane persons, so found by inquisition or otherwise, in those jurisdictions where it is provided that after office found the subject shall be civilly dead or incapable of doing any valid act.¹

§ 352. If an executor or administrator becomes insane before his trust is executed, the proper court may grant administration to another.2 In England, if the administrator has been found lunatic by inquisition, the practice is to make a limited grant of administration with the will annexed to the committee of his estate,8 or by the consent, express or implied, of the committee of the estate the administration may be granted to the committee of the person or to a residuary legatee.4 If the lunatic has not been so found by inquisition, but his property has been brought under the protection of the court of lunacy, under the provisions of the Lunacy Act of 1862,5 administration pending the lunacy is granted to the person appointed under the act to take care of his person and estate.6 When the case falls under neither of these heads, administration pending the lunacy is granted to the next of kin or some other person for the use and benefit of the lunatic. Where one of several executors or adminis-

- In Louisiana, where the code, following the rule of the civil law, provides that a judicial finding of insanity shall render its subject civilly dead, it is held that a mere application to have a person interdicted does not revoke or affect a power of attorney previously given to him. Germon v. Dubois, 23 La. Ann. 26. See Celina, in re, 7 La. Ann. 162; Civil Code, 2996, 3027.
- ² 1 Williams on Executors, 579; Hill v. Mills, 1 Salk. 36; Evans v. Tyler, 2 Robert, 128; Anonymous, 1 Cas. temp. Lee, 625.
 - * Phillips, in the goods of, 2 Add. Ecc. 335.
- Scarlett, in the goods of, 27 L. T. N. S. 215; Milnes, in the goods of, 3 Add. Ecc. 55. In the latter case it was held that administration with the will annexed might be committed to a residuary legatee, during the lunacy of a surviving executor and residuary legatee, in trust, at least with the given or implied consent of the lunatic's committee. See also Rodnall v. Webb, cited in reporter's note to the same case.
 - ⁵ See § 53, ante.
 - ⁶ Slumbers, in the goods of, 34 L. J. N. s. P. & D. 93.
- Fivans v. Tyler, ubi supra; Evelyn, ex parte, 2 M. & K. 4; Crump, in the goods of, 3 Phill. 497; Hardwicke, in the goods of, 1 Hagg. Cons.

trators becomes insane, the court will revoke the former, and grant new letters to the sane executor or administrator,¹ reserving the power to grant letters to the insane executor or administrator when he shall have recovered and shall apply for the same.² It is apprehended that the powers thus exercised by the English ecclesiastical courts are to be considered as vested in the courts of probate jurisdiction in the United States.³

§ 353. In England, the inconveniences arising from the mental incapacity of trustees and persons seized or possessed of property subject to equities, as mortgagees, or trustees or assignees in bankruptcy, have been remedied by a series of statutory enactments.4 The powers conferred by these acts are of three kinds. (1.) The divesting an insane trustee or mortgagee of property vested in him, and the vesting it in some other person. (2.) The appointment of a new trustee in the place of the insane trustee. (3.) The appointment of a new trustee when the person in whom the power of appointment was originally vested is of unsound mind.⁵ It is said in regard to the exercise of the powers conferred by the Trustee Acts that the Lord Chancellor sitting in Lunacy, alone, has, in ordinary cases, the jurisdiction. But a special jurisdiction is given the High Court of Justice to make orders under the acts, in certain cases. It is apprehended that the powers

483; Sharland, in the goods of, 25 L. T. N. s. 574; Binckes, in the goods of, 1 Curt. 286.

- ² Marshall, in the goods of, ubi supra.
- 8 Hawkins v. Robinson, 3 Mon. 143.

- ⁵ Pope, Lun. 267.
- 6 Ibid. 271. See § 51, ante, note. For a full discussion of the powers

¹ Phillips, in the goods of, 3 Add. Ecc. 335; Marshall, in the goods of, 1 Curt. 297; Newton, in the goods of, 3 Curt. 428. In Yetts v. Palmer, 9 Jur. N. s. 954, the court refused to restrain a married woman whose husband was a lunatic, and who had been appointed a co-executrix with him, from taking out probate. But the opinion was intimated that if she took out probate she would be restrained from intermeddling with the trust estate.

⁴ See § 51, ante, and note. The statutes upon this subject at present in force are the Trustee Acts of 1850, 1852 (13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55; see Appendix); §§ 137, 138 of the Lunacy Regulation Act of 1853 (16 & 17 Vict. c. 70; see Appendix); and the act of 23 & 24 Vict. c. 145.

conferred by the acts will not be exercised unless the trustee alleged to be insane appear to be so within the definition of lunacy prescribed by the Lunacy Regulation Act in cases of commissions de lunatico inquirendo.¹

§ 354. In the United States it is very generally provided by statute that the proper court may, upon application of the persons beneficially interested in a trust created under a written instrument, remove a trustee, if such removal appears essential to the interests of the applicants, or if the trustee appears to be insane or otherwise incapable. So where it appears expedient that property held in trust by an insane trustee, whether real or personal, or interests therein, should be sold for the benefit of persons beneficially interested, the courts of equity or probate may generally order a sale or conveyance thereof, and appoint a suitable person to convey in the place of the insane trustee.2 And it would seem, at least in those jurisdictions where the control of insane persons and their estates is considered to be vested in the courts of equity, that the general powers of the court will authorize it, without statute authority, to remove the insane trustee of a resulting or constructive trust.8

SECTION XI.

OF INSANE TORT-FEASORS.

§ 355. Since in a civil action for a tort it is not necessary to aver or prove any wrongful intent on the part of the defendant, it is a rule of the common law that although a lunatic

exercised under the trustee acts, and practice under those acts, see Pope, Lun. ch. iv., passim; Elmer's Practice in Lunacy, ch. xii., passim.

- 1 It is provided that in such cases the inquiry shall be "whether or not the person who is the subject of the inquiry is at the time of such inquiry of unsound mind and incapable of managing himself or his affairs." Act 25 & 26 Vict. c. 86, § 3. Under the Act 1 Wm. IV. c. 60, § 22 (now superseded), where it did not appear that the old trustee, though incapable of managing his affairs, was a lunatic, the court refused to appoint a new trustee. Wakeford, in re, 1 Jones & La T. 2.
 - ² See Pub. Sts. Mass. c. 141, §§ 9, 21.
 - * See Story Eq. Jur. §§ 1287, 1289.

may not be punishable criminally, he is liable, in a civil action, for any tort he may commit. And this would appear to be the rule even although the plaintiff at the time of the commission of the tortious act knew that the defendant was insane and might have prevented the commission of the act, or although the insane person was under guardianship at the time, and the property which was the subject of the tort was within the care and management of his guardian. The fact that the defendant was intoxicated at the time of the commission of the tortious act is not a defence to a civil action brought therefor.

§ 356. The ordinary rule, that in actions of tort damages are to be measured by the extent of the actual injuries received by the plaintiff, applies to such actions brought against insane defendants. Thus, in an action brought against a lunatic for setting fire to and burning a barn, it was held that evidence of the defendant's lunacy, and that the burning was the result of accident, was not admissible in mitigation of compensatory damages. And those courts which apparently hold that punitive damages may be recovered in

- ¹ 1 Chitt. Pl. *65; 2 Roll. Abr. 547; Bac. Abr. Idiots and Lunatics, E; Weaver v. Ward, Hob. 134; Haycraft v. Creasy, 2 East, 92; Cross v. Andrews, Cro. Eliz. 622; Cross v. Kent, 32 Md. 581; Ward v. Conatser, 4 Baxt. 64; Taggard v. Inness, 12 U. C. C. P. 77; Krom v. Schoonmaker, 8 Barb. 647.
- ² Morse v. Crawford, 17 Vt. 499. This was an action for the destruction of property intrusted to the defendant, and it was held no defence that the plaintiff at the time of delivering the property to the defendant knew that the latter was insane.
- * See Morain v. Devlin, 132 Mass. 87. In this case it was held that a lunatic is civilly liable for an injury caused by the defective condition of a place not in the exclusive occupancy and control of a tenant upon real estate of which he is the owner, and of which his guardian has the care and management. The court, after stating the general rule as laid down in the text, said that the specific case did not require the affirmance of so broad a proposition, since the action was not for a personal tort or neglect of the defendant, but for an injury suffered by reason of the defective condition of a place not in the exclusive occupancy of the tenant, and for the neglect of which the owner would be liable, and the fact of his lunacy could not excuse him. See Williams v. Cameron's Estate, 26 Barb. 172.
 - 4 Prentice v. Achorn, 2 Paige, 30.
 - ⁵ Cross v. Kent, 32 Md. 581. And see Sedg. Dam. 555, n. 1.

actions of tort as against sane defendants recognize a different rule in respect of insane tort-feasors, and in such cases limit the amount of damages recoverable to compensation for the actual injuries caused by the tortious act.¹

§ 357. It would seem that if one knowingly employs an insane person as his servant or agent, he will be liable for damages to innocent third parties resulting from acts done by the insane person in the scope of his employment. By an application of this principle it has been held that if a municipal corporation, knowing a person to be a lunatic, commission such a person by its license to follow within its limits a dangerous avocation, — that of apothecary, — the exercise whereof requires great caution and circumspection, and while such person is so engaged under such license any injury be done to an individual by the act of such person in the pursuit of such business, the corporation is liable in damages to the injured party.²

§ 358. It has been held that insanity is a good plea in defence to an action for slander, and that under the general issue pleaded in such an action the defendant might prove, either in excuse or mitigation of damages, according to circumstances, that he was insane when the actionable words were spoken. So it has been held to be ground in equity for a perpetual injunction to a judgment in an action for slander, that, at the time of speaking the defamatory words, the defendant was insane or in a state of partial mental derangement on the subject to which the words related. But it is believed that actions for defamation, whether libel or slander, come within the general rule as stated, and that insanity is no

¹ Krom v. Schoonmaker, 3 Barb. 647; Ward v. Conatser, 4 Baxt. 64.

² Cole v. Nashville, 4 Sneed, 162.

^{*} Bryant v. Jackson, 6 Humph. 199. No authority is cited to the point.

⁴ Yeates v. Reed, 4 Blackf. 463. In this case the court cite Homer v. Marshall, 5 Mun. 446, and Dickinson v. Barber, 9 Mass. 225; but in the latter case the court in Massachusetts observed that they gave no opinion as to how far or to what degree insanity was to be received as an excuse in an action for slander.

Homer v. Marshall, ubi supra. In this case no authority is cited to the point decided.

defence to such actions; although it is obvious that the fact of the defendant's insanity, especially if this be notorious, may well be considered in the estimation of the plaintiff's damages. In an action for slander occurring in Massachusetts the court said that where the derangement was great and notorious, so that the speaking the words could produce no effect on the hearers, no damage would be incurred; but where the degree of insanity was slight or not uniform, the slander might have its effect, and it would be for the jury to judge of this upon the evidence before them, and measure the damages accordingly.¹

§ 359. The committee or guardian of an insane person is entitled to compensation for damage occasioned to his own property by the tortious acts of such person, which damage may be ascertained after the termination of his trust.2 And any claim in favor of the guardian against third parties accruing out of the destruction of the guardian's property by the ward may be enforced, unless it appears that the guardian's own negligence contributed to such destruction. Thus in a case where the husband of an insane wife was the owner of buildings insured by the defendants, and the care and custody of the wife had been intrusted to her husband, and she afterwards burned the buildings while insane, the defendants were held liable for the loss, in the absence of proof that the act of the wife was the result of a sane motive, or that there was such a degree of negligence or carelessness on the part of the husband as would evince a corrupt design or fraudulent purpose on his part.8

Note. — Torts committed against Insane Persons. In the case of ordinary injuries where the res gestæ are not complicated by the fact of the subject's incapacity (as in the case of an ordinary assault committed upon an insane person), it is apprehended that the remedy for the injury is to be sought in an action in common form, by or in behalf of the lunatic. But where the injury, not resulting from implied malice or wilful intent, would not have resulted but for the incapacity of the party suffering it, it seems that the party inflicting such injury will not be responsible in dame

¹ Dickinson v. Barber, 9 Mass. 225.

² See Brown v. Howe, 9 Gray, 84.

⁸ Gove v. Insurance Co., 48 N. H. 41. See Lawton v. The Sun Mutual Ins. Co., 2 Cush. 500.

ages therefor, unless he had notice of the incapacity or was charged with some peculiar duty in respect of the insane party which he tortiously or carelessly neglects. Thus a lunatic was travelling in the cars upon a railroad in company with his father, who had paid the fare of both through and taken tickets. The father got out at a stopping-place to procure refreshments, leaving his son in the cars, without giving notice to any one of his situation; and while absent the train started. On regaining the cars the father did not find his son where he had left him, the latter having changed his seat. The conductor, in the absence of the father, applied to the lunatic for his ticket, not knowing him to be insane or that his fare had been paid. The lunatic refusing to deliver his ticket, the conductor caused the train to be stopped and the lunatic to be put off the train, in consequence of which the latter was run over by another train and killed. The evidence not showing any negligence or want of care on the part of the conductor, but showing the great negligence and imprudence of the lunatic and his father, it was held that no action could be maintained by the personal representatives of the lunatic against the railroad to recover damages under the statute. Willetts v. Buffalo & Rochester R. R., 14 Barb, 585.

It is a familiar rule of law that the intoxication of a party at the time of an injury inflicted upon him by the negligence of another is a circumstance to be considered by a jury in determining whether the party himself was in the exercise of due care at the time the injury was received. In Fitzgerald v. Weston, 52 Wis. 354, it would seem to have been considered that the same rule would apply when the plaintiff in a similar case was in a condition of mental imbecility. In that case it was held error to instruct the jury to the effect that the "fact of intoxication alone" would not "prove contributory negligence," unless the proof showed such a degree of intoxication that "imbecility would begin to affect" the intoxicated person, — such instruction being regarded as liable to mislead the jury.

In the case of a tort committed against a person sane at the time of the injury, and an action brought therefor, it would seem that the suicide of the injured person resulting from insanity, which was the consequence of the injury, is not to be anticipated as among the natural and probable consequences of the defendant's act. Scheffer v. Railroad Company, 105 U. S. 249. In this case Miller, J., said: "His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials as his suicide, and each of these are casual or unexpected causes intervening between the act which injured him and his death."

CHAPTER XI.

OF TESTAMENTARY CAPACITY AS AFFECTED BY INSANITY.

SECTION I.

DEFINITION OF TESTAMENTARY CAPACITY.

§ 360. It has already been stated that, when the question of the validity of a will is put in issue by the allegation of the testator's mental incompetence at the time of the factum, the weight of authority is in favor of the rules, (1) that the sanity of the testator is to be presumed until the contrary is proved, and (2) that, formal proof of the will being produced, the burden is upon the contestant to prove incapacity. It remains to consider, in the light of the rules and principles already laid down, those definitions of testamentary capacity which the law has prescribed.

- ¹ See §§ 177-179, ante, and cases cited.
- ² See §§ 180-185, ante, and cases cited.
- ⁸ See §§ 270, 271, ante, and cases cited.
- 4 The question of testamentary capacity most commonly arises, in the first instance, upon the proffer of the will for probate before the proper court. An appeal from the decision of the judge of probate or surrogate is ordinarily followed by the framing of a proper issue or issues for a jury in the appellate tribunal. So, when the question of capacity comes in any manner to be considered in a court of equity, a feigned issue will generally be awarded to try the question. Gardner v. Gardner, 22 Wend. As to the form of issue where the entire will is impeached on the ground of the testator's alleged incapacity, and particular devises contained in the will are impeached on special grounds, see Lord Guillamore v. O'Grady, 2 Jones & La T. 210. In an early case in the Court of King's Bench, upon a suggestion that a devisor was not of sane and perfect memory at the time of making a will, which will contained a devise of manors, lands, &c., as well as of personal property, a prohibition was granted generally and not specially for the land only. Winchester's Case, 6 Coke, 23 a. But see Partridge's Case, 2 Salk. 552 (1702). The question in Winchester's Case arose upon an application of the rule of the common

§ 361. The definition of testamentary capacity is always for the court as matter of law; 1 and it is therefore the duty of the court to pass upon the legal sufficiency of the evidence proffered upon the issue, and it is error to submit the question to the jury, unless there is some evidence tending to prove that incapacity existed. The evidence of incapacity proffered must, in order to warrant the submission of the issue to the jury, clearly relate to the time of the factum, either directly, or when taken in its connection with other evidence

law, that while wills of personal property should be litigated in the ecclesiastical or probate courts, the validity of devises of real property could only be determined by a real action brought in a court of common-law jurisdiction. See Bogardus v. Clarke, 3 Edw. Ch. 266, as cited ante, § 208. As early as 1742 Lord Hardwicke thought it an absurdity that a will set aside at law for the insanity of the testator might still be litigated on account of personal estate in the ecclesiastical courts, and expressed a wish that the legislature would find a remedy. Montgomery v. Clark, 2 Atk. 278. Now, in England, the question of the validity of a will of personal property may be raised in the Probate Division of the High Court of Justice affirmatively by an offer of the will for probate in solemn form (Act 20 & 21 Vict. c. 77, §§ 61-63; 1 Williams on Executors, 332 et seq.); negatively, by moving for administration, as in the case of an intestacy (Watts, in the goods of, 1 Curt. 594; Bourget, in the goods of, id. 591); or by a caveat (1 Williams on Executors, 581). The question of the validity of a devise of real property may be raised affirmatively by application for probate, citing the heir (Act 20 & 21 Vict. c. 77, § 61 et seq.; Barraclough v. Greenhough, L. R. 2 Q. B. 612), or, in the Chancery Division, by an action to establish the will (see 2 Dan. Ch. Pr. American ed. *771 et seq.); and, negatively, by an action at law to recover the land (see Jones v. Jones, 7 Price, 663; Jones v. Frost, Jac. 466), or by an action to set aside the will (see Pemberton v. Pemberton, 13 Ves. 297; Middleton v. Sherburne, 4 Y. & C. 358). It is believed that generally, in the United States, at the present day, the courts of probate jurisdiction have authority in the first instance to pronounce upon the validity of wills alike of real and personal property.

¹ See § 151, ante, and cases cited; Kempsey v. McGinnis, 21 Mich. 123; and, contra, Robinson v. Adams, 62 Maine, 369, as cited in note to § 153.

In the case of one dying insane and leaving a will, invalid by reason of the party's insanity, the court will grant administration of his estate as of a dead intestate. Bourget, in the goods of, 1 Curt. 591; Perry v. Dyke, 1 Sw. & Tr. 12.

² Cauffman v. Long, 82 Penn. St. 72.

in the case.1 And since the facts on which the law will decide the question of capacity are, in each case, to be found by the jury,2 the issue must be so framed as to call for a decision of these facts alone, and not for that conclusion of law which it is the function of the court to pronounce. Thus a party requested that an issue might be framed as follows: "At the time said T. signed said will did she have mind and memory sufficient to understand the ordinary affairs of life and to act with discretion therein? Did she know her children and grandchildren and have a general knowledge of the estate of which she was possessed?" court below refused the defendant's request and framed this issue: "Was the said T. of sound mind at the date of the execution of the paper writing in contest?" Upon appeal, it was held that the issue framed was erroneous as presenting a question of law, and that the proper issue was expressed in the interrogatories framed and requested by the defendant.8

§ 362. As in the case of any civil act, the validity of which is called in question by reason of the alleged insanity of the doer, the inquiry is whether or not the act was affected in its quality by the alleged insanity, or, in other words, whether or not the act was the outgrowth and result of insane delusion respecting the act or its relations; so in cases where the issue is upon the capacity of an alleged testator at the time of the factum, the question is whether such capacity was equal to the subject-matter with which it had to deal,4 or,

In a case where a will and two or three subsequent codicils had been made, it was held error to instruct a jury that testamentary capacity must have existed at the time of the execution of each, but that the instruments should be sustained if capacity existed at the execution of any one of them. Brown v. Riggin, 94 Ill. 560. In Indiana, one who is the victim

¹ See § 218, ante; Stevens v. Vancleve, 4 Wash. C. C. 262; Kinne v. Kinne, 9 Conn. 102; Brown v. Torrey, 24 Barb. 583.

² Kempsey v. McGinnis, ubi supra; §§ 155, 156, ante.

^{*} Todd v. Fenton, 66 Ind. 25.

⁴ Turner v. Cheesman, 2 McCart. 243; Garrison v. Blanton, 48 Tex. 299; Redfield on Wills, 102. The law makes no distinction in the degree of capacity requisite to make a valid will of personal estate and that requisite to execute a valid devise of personal property. Sloan v. Maxwell, 2 Green Ch. 563; 6 Co. Rep. 24.

as the rule is often stated, whether the testator, at the time of making the paper produced as his will, knew and comprehended the act he was doing. It is apprehended that this definition includes all the incidents necessary in any case to determine the question of capacity.

§ 363. Thus it is evident that a correct understanding of the act done must include an intelligent comprehension of its surrounding circumstances, and of its direct consequences and probable results. So to constitute a sound disposing mind the testator must be able not only to understand that he is by his will disposing of his property, but he must also have capacity sufficient to comprehend the extent of the property devised and the nature of the claims of others upon him;²

of mental derangement in any form, amounting to insanity, is, under the statute, incompetent to make a will; and an instruction that such insanity would not avoid the will unless it be shown to have entered into and affected the will itself, was held erroneous. Eggers v. Eggers, 57 Ind. 461. See 2 R. S. 1876, p. 570, § 1; id. pp. 313, 797; id. p. 598, § 1.

¹ Wisener v. Maupin, 2 Baxt. 342; Horne v. Horne, 9 Ired. 99; Harrison v. Rowan, 3 Wash. C. C. 580; Chandler v. Ferris, 1 Harr. 454; Masten v. Anderson, 2 Harr. 381; Duffield v. Morris, id. 375; Sutton v. Sutton, 5 Harr. 459; Cordrey v. Cordrey, 1 Houst. 263; Lyons v. Van Riper, 11 C. E. Green, 337; Stropshire v. Reno, 5 J. J. Marsh. 91; Boyd v. Eby, 8 Watts, 66; Wood v. Wood, 4 Brews. 75; Thompson v. Kyner, 65 Penn. St. 868; Stancell v. Keenan, 33 Ga. 56; Ragan v. Ragan, 33 Ga., Supp. 106; Runkle v. Gates, 11 Ind. 95; Trish v. Newell, 62 Ill. 196; Yoe v. McCord, 74 Ill. 33; Abraham v. Wilkins, 17 Ark. 292; McClintock v. Curd, 32 Mo. 411; Harvey v. Sullens, 56 Mo. 372; Kingsbury v. Whittaker, 32 La. Ann. 1055. In Marsh v. Tyrell, 2 Hagg. 84, it is said that the competency of the mind must be judged only by the nature of the act done and a consideration of the surrounding circumstances, so that a person who can understand questions and answer them rationally may still be incapable of making a will. See also Combe's Case, Moore, 759, and Herbert v. Lowns, Reps. in Ch. 12. It is apprehended that the mere capacity to answer questions rationally is not now considered as of conclusive effect, taken by itself, upon the issue of testamentary capacity.

² Harwood v. Baker, 3 Moo. P. C. C. 282; Clark v. Fisher, 1 Paige, 171; Van Guysling v. Van Kuren, 35 N. Y. 70; Foreman v. Smith, 7 Lans. 443. In Harwood v. Baker, ubi supra, it was held that the testator must have capacity to comprehend the nature of the claims of those whom, by his will, he is excluding from participation in his property. This is believed to be a sound rule; but see Stevenson v. Stevenson, 33 Penn. St. 469, where it is held that if a testator design to give the whole of his

or, as the rule is generally stated, the testator must have a sufficient mind to comprehend the nature of the act he is performing, the relation he holds to the various objects of his bounty, and to be capable of making a rational selection among them. The English view of the law upon this subject is stated by Cockburn, C. J., who holds it as essential to the exercise of the power of testamentary disposition that the "testator shall understand the nature of the act and its effect; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison the affections, prevent his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it, which, if the mind had been sound, would not have been made."2

§ 364. Although it is admitted that the criterion of testamentary capacity lies in the testator's ability to weigh and

estate to a stranger, to the exclusion of his collateral relations, it is not necessary that he should have a recollection either of the property he intends to dispose of or of the persons related to him. Since distribution not being the thing intended in such a case, a competency to distribute is not the test of mental capacity. See also Gaither v. Gaither, 20 Ga. 709, in which case it was said that a testator, in order to make his will valid, need not "be able to criticise accurately the terms and provisions of his will or the estates created thereby."

1 Greenwood v. Greenwood, 3 Curt. (App.); Delafield v. Parish, 25 N.Y. 9; Tyler v. Gardiner, 35 N. Y. 70; Kinne v. Johnson, 60 Barb. 69; Watson v. Donnelly, 28 Barb. 653; Townsend v. Bogart, 5 Redf. 93; St. Leger's Appeal, 34 Conn. 434; Lowe v. Williamson, 1 Green Ch. 82; Daniel v. Daniel, 39 Penn. St. 191; Mintzer, in re, 5 Phil. 206; Horback v. Denniston, 3 Pitts. 49; Lawrence v. Steel, 66 N. C. 584; Kirkwood v. Gordon, 7 Rich. 474; Potts v. House, 6 Ga. 324; Johnson v. Moore, 1 Littell, 372; Bundy v. McNight, 48 Ind. 502; Lowder v. Lowder, 58 Ind. 538; Roe v. Taylor, 45 Ill. 485; Rutherford v. Morris, 77 Ill. 397; Carpenter v. Calvert, 83 Ill. 62; Brown v. Riggin, 94 Ill. 560; Bates v. Bates, 27 Iowa, 110; Benoist v. Murrin, 58 Mo. 304; Young v. Ridenbaugh, 67 Mo. 574; Tittel's Estate, 1 Myrick, 12; Crittenden's Estate, id. 50; Hubbard v. Hubbard, 7 Oregon, 42.

² Banks v. Goodfellow, L. R. 5 Q. B. 549; s. c. 39 L. J. n. s. Q. B. 237.

consider intelligently the act of disposition and its surrounding circumstances, yet it is held that the law here contemplates the act of disposition in the abstract, and not the specific form of the dispositions in a particular case. In other words, it is said that the question in every case is, "had the testator, as compos mentis, capacity to make a will; not, had he capacity to make the will produced. If compos mentis, he can make any will, however complicated; if non compos mentis, he can make no will, not the simplest." The rule thus stated was laid down in a leading case occurring in New York, and has been adopted elsewhere. Although its truth as an abstract proposition of law may be admitted, yet it is apprehended that, practically, in most cases, the question to be determined is whether the testator was at the time of the factum possessed of a mind sufficiently sound to make the will in question.8 This view is enforced by the consideration that the intrinsic evidence afforded by the will itself is competent, in connection with other testimony, upon the issue of the testator's capacity.4

§ 365. It follows as a deduction from the rule already stated that to constitute a sound and disposing mind it is not necessary that the mind should be unbroken, unimpaired, unshattered by disease or otherwise,⁵ or that the testator should be in full possession of his reasoning faculties.⁶ So if the testator be in a dying state he has capacity if, when

- ¹ Delafield v. Parish, 25 N. Y. 9; Legg v. Myer, 5 Redf. 628.
- ² Yoe v. McCord, 74 Ill. 33.
- Forman's Will, 54 Barb. 274.
- ⁴ See §§ 225-227, ante, and cases cited; sec. v., post. This rule is admitted in New York. Thus in Clarke v. Sawyer, 3 Sandf. Ch. 351, it was observed that valid wills are made daily by persons in the last stages of disease, when the bodily functions are totally prostrated and the mental powers much impaired, but that these circumstances are not considered as entitled to weight unless the testator's bequests are extravagant, or widely different from those which his situation and circumstances would lead a sensible man to expect. See also Van Pelt v. Van Pelt, 30 Barb. 134; Le Bau v. Vanderbilt, 3 Redf. 384, as cited § 386, post.
- Sloan v. Maxwell, 2 Green Ch. 563; Bundy v. McNight, 48 Ind. 502; Redf. Am. Cas. on the Law of Wills, 182, 200; Whitney v. Twombly, 136 Mass. 145.
 - 6 1 Jarman, Wills, 50; Runkle v. Gates, 11 Ind. 95.

forgetfulness of recent events in a testatrix eighty-three years old was held to be no evidence of incapacity to make a will.1 Nor will an occasional languor and absence, or even imbecility, of mind, exhibited by a testator, avoid his will, if these be only the natural and ordinary consequences of old age.2 In a case where it appeared in evidence that a testatrix was ninety-six years old when her will was executed, that by it she disinherited her only son and grandchildren and devised her whole estate to her son-in-law, who had procured the will to be prepared by counsel, and that shortly before its execution her son was confined in jail, upon complaint of some person unknown, for an alleged assault upon her, and was then discharged without trial, it was held that these facts would, if not controlled by rebutting testimony, be sufficient to justify a decree invalidating the will; but the attesting witnesses and others having sworn positively to the fact of her mental capacity, the will was sustained.3

- ¹ Eddy's Case, 5 Stew. 701; Wintermute's Will, 12 C. E. Green, 447. In the latter case the failure of a testator's memory, in stating, as witness in a suit tried nine months after the execution of his will, and when he was enfeebled by an illness so severe as to endanger his life, that he had given his wife a part of his personal estate, when he had given her none, was held to be no criterion of the condition of the testator's mind when he executed the will. But where a will had been executed in April and a codicil in June, by one eighty years of age, and the subscribing witnesses, who were the same to both papers, did not testify in favor of his capacity, but one of them thought him of unsound mind; and it appeared that in the succeeding autumn the testator failed to recognize his children, and inquired how many he had, and could not name them all, it was held that a surrogate's decision refusing probate to either paper should be affirmed. Dumond v. Kiff, 7 Lansing, 465.
 - ² Higdon's Will, 6 J. J. Marsh. 445.
 - 3 Jennings v. Pendergast, 10 Md. 346. See note to § 366, ante.

Where a robust man eighty-three years of age, of a rough and passionate disposition, being influenced by the belief that his son had robbed him, unsuccessfully attempted to kill his son, and then immediately inflicted a mortal wound upon himself, expressed regret at not accomplishing his full purpose, took from his pocket securities amounting to one third of his property and gave them to a favorite daughter-in-law, thus departing from previously declared intentions respecting the final disposition of his property, it was held that these facts did not establish the insanity of the donor so as to defeat the gift. Crum v. Thornley, 47 Ill. 192.

§ 368. Mere nervousness and eccentricity closely approaching delusion, even in a subject who seldom managed his own business affairs, are not evidence of testamentary incapacity. In a case where it appeared that for a few months before his death the testator was supposed to be affected with disease of the brain, which produced occasional convulsions and partial paralysis, two of these convulsions having occurred while he was dictating his will, and a physician testified that he suffered from softening of the brain, which, however, might occur without producing disorder of intellect, though impairing the will and steady purpose, the will was sustained. But the existence in the testator of mental incapacity produced by the use of morphine for eight or ten days before the execution of the will has been held ground for declaring it invalid.

§ 369. Although drunkenness will render invalid any civil act of its subject if, at the time of the act, it exist to such a degree as to destroy his sound judgment and comprehension in respect of the act done, mere habitual drunkenness, even in one who also suffers from the effects of old age, bodily infirmity, and failure of memory, will not, necessarily, destroy his testamentary capacity. When the testator's habits of intoxication are not such as to render him habitually incompetent for the transaction of business, the party setting up incapacity on the ground of casual intoxication must show the existence of the alleged intoxication at the very time of the execution of the will; for it is considered, when want of testamentary capacity arising from drunkenness is alleged, that a different rule is to be applied respecting the

- ¹ Mercer v. Kelso, 4 Gratt. 106.
- ² Errickson v. Fields, 3 Stew. 634.
- Parramore v. Taylor, 11 Gratt. 220; and see Rutherford v. Morris, 77 Ill. 897.
 - 4 Stedham v. Stedham, 32 Ala. 525.
 - ⁵ See §§ 295, 297, ante.
- Whitenack v. Stryker, 1 Green Ch. 9; Thompson v. Kyner, 65 Penn. St. 368; Pierce v. Pierce, 38 Mich. 412; Convey's Will, 52 Iowa, 197; Wheeler v. Alderson, 3 Hagg. Ecc. 574.
- ⁷ Andress v. Weller, 2 Green Ch. 604; Julke v. Adam, 1 Redf. 454; Hart v. Thompson, 15 La. 88; Pierce v. Pierce, 38 Mich. 412.

burden of proof from that which obtains when ordinary insanity is set up to defeat the will.¹ Although the testator appear to have been an habitual drunkard, proof of this fact will not destroy the legal presumption of his general capacity, and the burden of showing want of capacity will remain throughout upon the party contesting the will.² But when the contestant alleges the existence of mental derangement produced by intemperance, with lucid intervals, it is incumbent upon the proponent of the will to show that it was executed in one of these intervals.³ And in such cases the question of drunkenness, being one of evidence merely, will not be submitted as a distinct issue to the jury.⁴ As in cases of ordinary insanity, it is held that the testimony to establish incapacity arising from intoxication must be confined to the time of the factum.⁵

§ 370. The law requires that, in order to render his will valid, the testator must have been possessed of a disposing memory; for one in whom this faculty is totally extinguished cannot be said to possess understanding to any degree whatever, or for any purpose. And it is said that at common law, as well as under the statutes of New York relative to wills of personal property, the words "mind" and "memory" are convertible terms. But the testator's memory may be very imperfect: it may be greatly impaired by age or disease, and yet be sufficiently sound for testamentary purposes. The question is, not what was the degree of his memory, but whether his memory was sufficient to enable him to collect in his mind, without prompting, the elements of the business to be transacted, and to retain them sufficiently long to perceive their

¹ Ayrey v. Hill, 2 Add. Ecc. 206.

² Black v. Ellis, 3 Hill (S. C.), 68; s. c. Riley, 73; Temple v. Temple, 1 Hen. & Mun. 476; Hebert v. Winn, 24 La. Ann. 385. See McSorley v. McSorley, 2 Bradf. 188; Burritt v. Silliman, 16 Barb. 198.

^{*} Cochran's Will, 1 Mon. 263.

⁴ Gharky's Estate, 57 Cal. 274; and see Hannigan's Estate, 1 Myrick, 135.

⁵ Pierce v. Pierce, 38 Mich. 412.

⁶ Forman's Will, 54 Barb. 274.

⁷ Stevens v. Vancleve, 4 Wash. C. C. 262.

obvious relations to each other, and to form a rational judgment regarding them.¹

(a.) Imperfect or Erroneous Definitions.

§ 371. It is believed that no other definition of testamentary capacity than that already given 2 can be stated as a rule of law; and although, in many cases, it has been attempted to apply closer rules, it seems that the tests stated in such cases are either worthless when applied to another set of facts, or are positively misleading. Thus it is said that to prove a testator to have been of sound mind, it is sufficient to prove that he had capacity equal to the transaction of ordinary business with sagacity and discretion. But it is obvious that

¹ Van Guysling v. Van Kuren, 35 N. Y. 70; Aiken v. Weckerly, 19 Mich. 482; Lowder v. Lowder, 58 Ind. 538; Converse v. Converse, 21 Vt. 168; Yoe v. McCord, 74 Ill. 33. In the latter case it is said that failure of memory is not sufficient to create incapacity unless it be total, or extend to the testator's immediate family or property.

In Converse v. Converse, ubi supra, Redfield, J., said: "It may be safe, no doubt, to affirm, that, in making any contract [will?] understandingly, one must have something more than a mere passive memory remaining. He must undoubtedly retain sufficient active memory to collect in his mind, without prompting, particulars or elements of the business to be transacted." This statement is disapproved in Trish v. Newell, 62 Ill. 196, as imposing, in effect, upon the testator the test of the sound and healthy capacity of an ordinary man. But the passage, considered with its context, does not appear to be open to the criticism made upon it by the Illinois court.

In McMasters v. Blair, 29 Penn. St. 298, it was held not to be necessary that at the time of the factum the testator should recollect all his estate, his family relations, their condition in general, and the probable effect the proposed disposition would have, and to collect this all in one view; and Lowrie, J., said: "Very often a disposing mind needs very little power of reflection, because it has little to reflect about. The work of reflection has been performed before; and when the time for making the will comes, memory alone is wanted in order to dictate the results." This dictum would seem to apply to all cases the probabilities which might well exist upon a particular set of facts, and so to be objectionable as a statement of principle. But the doctrine appears to have been adopted in Daniel v. Daniel, 39 Penn. St. 191, Carpenter v. Calvert, 83 Ill. 62, and Young v. Ridenbaugh, 67 Mo. 574.

- ² See § 362 et seq.
- * Gleespin's Will, 11 C. E. Green, 523; Barnes v. Barnes, 66 Maine,

although proof of capacity to transact ordinary business may well be admissible as evidence tending to show testamentary capacity, yet it cannot, as matter of law, be conclusive of the fact of such capacity, since, in all cases, the capacity must be adapted to the performance of the specific act in controversy and no other.² And the same objection is applicable to the rule laid down, that less capacity is required to execute a valid will than to transact ordinary business,8 and to those opinions which intimate that if a testator has sufficient capacity to make a contract he is capable of making a valid will; 4 for it is clear that a man may be capable of disposing by will and yet incapable to make a contract, or to manage his estate,⁵ and, on the other hand, that sometimes it may require a higher degree of capacity to make a contract than to make a will.6 So in Alabama, the question being directly presented whether the establishment of a will does not require more certain proof of the possession of a sound mind by the testator than would be required to fix the liability of the same person to a contract, the court decided the question in the neg-

286; Ford v. Ford, 7 Humph. 92; Coleman v. Robertson, 17 Ala. 84; Meeker v. Meeker, 75 Ill. 260; Carpenter v. Calvert, 83 Ill. 62.

- ¹ Bannatyne v. Bannatyne, 16 Jur. 864.
- ² Whitney v. Twombly, 136 Mass. 145.
- * Stubbs v. Houston, 33 Ala. 555; Thompson v. Kyner, 65 Penn. St. 368.
- 4 Chandler v. Barrett, 21 La. Ann. 58; Jenkins v. Tobin, 29 Ark. 151; Robinson v. Robinson, 39 Vt. 267; Comstock v. Hadlyme, 8 Conn. 254. The doctrine of the last-named case was not followed in Kinne v. Kinne, 9 Conn. 102, where it was held, in conformity with the rule stated, that it is not essential to the legal capacity of a testator to make a will, that he should be capable of managing business generally, it being sufficient if in the making of his will he understands what he is doing.
- ⁵ Harrison v. Rowan, 3 Wash. C. C. 580; Stevens v. Vancleve, 4 Wash. C. C. 262; Brinkman v. Rueggesick, 71 Mo. 553. See also Errickson v. Fields, 3 Stew. 634.
- ⁶ Kirkwood v. Gordon, 7 Rich. 474. It has been held that wills are more easily to be avoided than contracts, on the ground of insanity, Aubert v. Aubert, 6 La. Ann. 104; and, on the other hand, that a will is not to be set aside on as slight evidence of mental unsoundness as would overturn a contract or conveyance executed on a consideration very questionable, Clarke v. Sawyer, 3 Sandf. Ch. 351; but it is apprehended that these expressions can be of no value as establishing a rule of law.

ative, saying: "In either case the act would be void if the actor was not of sound mind; but we know of no rule by which the legal capacity is graduated by the act. There can be no middle ground between legal capacity and incapacity to make either a contract or a will, and both must stand in regard to this question precisely on the same footing." 1

§ 372. In discussing the definition of testamentary capacity it is necessary to notice a line of American cases which appear to lay down a different rule to that already stated, and one which is not in accordance with the best modern authority. The most important of these is the case of Stewart v. Lispenard,2 in which the court in New York held that imbecility of mind in a testator will not avoid his last will and testament; that idiots, lunatics, and persons non compos mentis are disabled from disposing of their property by will, but every person not embraced within either of the above classes, of lawful age and not under coverture, is competent to make a will, be his understanding ever so weak; that the courts, in passing upon the validity of a will, do not measure the extent of the understanding of the testator; and that if the testator be not totally deprived of reason, whether he be wise or unwise, he is the lawful disposer of his property, and his will stands as a reason for his actions. It was added, that if the testator was possessed of a "glimmering of reason," his will was to be supported; and the court said: "The cases in the books avoiding devises, conveyances, and contracts of the imbecile do not conflict with the above rule. In those cases the acts were held void, not on account of the general and positive disability of the party to perform all similar acts, but because the whole transaction, with its accompanying circumstances, including of course the fact of mental imbecility, evinced that his consent was wanting to the particular act the subject of adjudication."8 So it was held in a subsequent case occurring in

¹ McElroy v. McElroy, 5 Ala. 81.

² 26 Wend. 255 (1841).

^{*} Citing Winchester's Case, 6 Co. 23 a; Den v. Johnson, 2 South. 454. See Den v. Vancleve, id. 589 (1819). In the latter case, Kirkpatrick, C. J., defined the word "sane" as meaning "whole, sound, in a healthful state, unbroken, unchanged by disease or infirmity, so as to contemplate

the same state that mere imbecility of mind in a testator, however great, would not avoid his will, provided he were not a lunatic or idiot.¹ And the rule in Stewart v. Lispenard was cited with approval in Georgia.²

§ 373. The fallacy of the rule thus attempted to be established would seem to arise from an attempt to apply to cases involving testamentary capacity the ancient technical rules, (1) that only the acts of persons lunatic, idiot, or non composementis are to be avoided by reason of the incapacity of such persons, and (2) that the words non composementis are to be taken to imply a total deprivation of sense. And the latter rule is adopted in terms in the case of Potts v. House. But, as has already been stated, modern jurisprudence rejects this definition of the words non composementis; and, if a party is found mentally incapable of performing a particular act, considers him, in so far as legal capacity is concerned, as of unsound mind in respect of that act. The court in New York, in the leading case of Delafield v. Parish, disapproved

reasonably his property and its parts, his family, their conditions, necessities, and demerits, and his duties and obligations as a father." This definition was rejected by the majority of the court, Southard, J., observing that few wills could be confirmed if it were adopted.

- ¹ Blanchard v. Nestle, 3 Denio, 37.
- ² Potts v. House, 6 Ga. 324, explained in Terry v. Buffington, 11 Ga. 337. See Morris v. Stokes, 21 Ga. 552.
 - * See § 1.
- 4 In Townsend v. Bogart, 5 Redf. (N. Y.) 93 (1881), the Surrogate, apparently adopting the ancient construction of the words non compose mentis, observed that the use of the term as a standard of mental capacity is liable in certain cases to mislead, not all who come within its description being competent to make a will. But in Legg v. Myer, 5 Redf. 628 (1882), it was held that "if one be compose mentis he can make any will, however complicated; otherwise, none, however simple." If by the use of the term the Surrogate intends the soundness of the party's mind in respect of the act of testamentary disposition, the rule stated may be admitted to be sound; otherwise, it is not believed to be in accordance with the weight of authority.
- 5 25 N. Y. 9. But the court held that in law the only standard as to mental capacity in all who are not idiots or lunatics is found in the fact whether the testator was compos mentis or non compos mentis, as those terms are used in their fixed legal meaning. The doctrine of Stewart v. Lispenard is also disapproved in Trish v. Newell, 62 Ill. 196.

the rule stated in Stewart v. Lispenard; and it is now said to be the established rule in that state, as elsewhere, that a testator, in order that his will may be valid, must have a sufficient mind to comprehend the nature and effect of the act he is performing, the relation he holds to the various objects of his bounty, and to be capable of making a rational selection among them, and that the sound mind required by the statute to qualify a person to make a will cannot be satisfied by any different rule.

SECTION II.

DELUSIONS AS AFFECTING CAPACITY.

(a.) As to their Quality.

§ 374. The true test of insanity as affecting testamentary capacity, excepting in cases of dementia or total loss of mind and intellect,8 is delusion.4 And whenever, upon the issue of testamentary capacity, it is alleged that the testator was the subject of delusion, it must be shown, in order to make proof of the delusion competent evidence upon the issue, that the delusion was insane in its nature and quality. This is the rule whether it be maintained that the provisions of the will were affected directly by the delusion, or whether the delusion be relied on as a symptom indicating unsoundness of mind in respect of all subjects. Thus it must appear, in order to make the proof competent, that the delusion existed as to facts within the testator's own observation, and that he actually believed in the existence of facts which a sane man would not have believed in.6 So mere moral insanity, or the perversity of the moral feelings, cannot, of itself, invalidate

<sup>Delafield v. Parish, 25 N. Y. 9; Van Guysling v. Van Kuren, 35 N. Y.
70; Tyler v. Gardiner, id. 559; Kinne v. Johnson, 60 Barb. 69.</sup>

² Kinne v. Johnson, supra.

^{*} See § 16, ante.

⁴ American Seamen's Friend Soc. v. Hopper, 33 N. Y. 619; and see § 13, ante, and cases cited.

⁵ See §§ 13–15, ante, and cases cited.

⁶ Ditchburn v. Fearn, 6 Jur. 201.

the will of its subject.¹ It is always a question of law for the judgment of the court whether a particular delusion is in its quality sane or insane.²

§ 375. The principle thus stated has been applied in numerous cases. Thus mere eccentricity of mind, manifesting itself in erroneous, foolish, and absurd opinions on certain subjects, does not constitute insane delusion, and is not, of itself, evidence of insanity.8 So where a testator believed in witches, devils, and evil spirits, which he fancied tormented him, lived in a strange and brutish manner, wore an extraordinary dress, slept in a hollow gum-log, made strange bargains and exhibited innumerable extravagances, but was able in other respects to manage his affairs, his will was pronounced valid.4 And where one was a firm believer in spiritualism, and acted in business affairs on the communications of mediums, it was held that he was, notwithstanding, of sound and disposing mind.⁵ Where a testator had habitually spoken of his kept mistress, who had died before him, as having been a person of deep religious opinions, the fact of the possible existence in his mind of a deluded opinion upon this subject was held to be no evidence of his want of capacity, since no opinion upon moral matters, however absurd, will of itself constitute an insane delusion.6

§ 376. So the fact that a testator was eccentric, excitable, passionate, and very nervous; was on certain subjects believed by many to be insane through excited feeling; that he believed in spiritualism, the Book of Mormon, or in Fourierism; talked very much like a fool; had visions and believed in them, — is not enough to show a want of sound and disposing mind and memory, provided he attended constantly to his business, and managed it with capacity, care, and skill, and in other practical respects appeared to be of sound mind.

- ¹ Frere v. Peacock, 1 Rob. Ecc. 442; and see § 10, ante, and cases cited.
- ² See §§ 151, 156, ante, and cases cited, and contra, Robinson v. Adams, 62 Maine, 369, as cited § 153, ante.
 - * Thompson v. Thompson, 21 Barb. 107.
 - 4 Lee v. Lee, 4 McCord, 183.
 - ⁵ Smith's Will, 52 Wis. 543.
 - 6 Ditchburn v. Fearn, 6 Jur. 201. See § 14, ante, and cases cited.
 - 7 Turner v. Hand, 3 Wall. Jr. C. C. 88.

In a case where it appeared that a testator was of strange and eccentric habits and manners; had an extraordinary way of expressing himself; seemed to believe that one of his relatives had been murdered by poison, and that there was in existence a scheme to poison himself, and used extraordinary precautions against it,—it was held that though the deceased was eccentric he was not deranged, that he had not in his mind any morbid delusion irresistibly overbearing his reason, and that he was possessed of testamentary capacity.¹

§ 377. It is considered that no beliefs as to future rewards and punishments, or as to the nature or existence of a future state, are to be accepted as evidence of insanity, since there is no test by which the truth or falsity of such beliefs can be determined. Thus, in a case where it appeared that a testator had believed, in reference to a future state of existence, that there were degrees of happiness therein, and that in whatever circle a man lived on earth he would move in the same circle in his future state, and that his pre-eminence there would depend particularly on the amount of property he might have acquired here and the charitable purposes to which he might have appropriated it, it was held that such opinions constituted no evidence of insanity.2 The same rule was applied where it appeared that the testator believed that the souls of men after death passed into animals.8 So it is said that extreme religious anxiety, or even hopeless despair, caused by the conviction that the sufferer had passed the day of grace, and so overwhelming as to render him unconcerned or listless on all other subjects, may exist consistently with unimpaired reason, and cannot justify the conclusion that the person so affected was incapable of making a valid will.4

§ 378. Mere unreasonable prejudices against the testator's relations, and absurd and groundless suspicions concerning

¹ Walcot v. Alleyn, Milward, 65. In the opinion in this case, by Doctor Radcliffe, the nature of insane delusion, or monomania, and its effects upon testamentary capacity, are discussed elaborately.

² Gass v. Gass, 3 Humph. 278.

^{*} Bonard's Will, 16 Abb. Pr. N. s. 128.

Weir's Will, 9 Dana, 440; and see Chafin Will Case, 32 Wis. 557.

them, will not alone be sufficient to invalidate the will.1 Thus, in a case tried at nisi prius, it appearing that the testator entertained cruel and groundless prejudices against his brother, whom by the terms of the will he had disinherited, Lord Kenyon, after stating to the jury the legal definition of testamentary capacity, said: "The conduct which he held towards his brother is certainly unaccountable, if, whenever his brother's name occurred, instantly a fit of delirium had seized him, then I should conceive that he was not competent to make his will; but if his mind remained entire, if he had new raised up prejudices against his brother, though upon improper grounds, yet if they were such prejudices as might reside in a sound mind, it is hard that those prejudices should lead to conclusions unfavorable to his brother; but . . . it is better that a thousand hard cases should take place, than that we should remove the landmarks by which man's property is to be decided. It is for you to look at that conduct to his brother, to see whether it is evidence of derangement of mind, or whether only an unreasonable prejudice which he indulged against his brother: if it be the last, that did not unfit him to make his last will and testament. You are to consider whether his mind was entire to make the disposition, — not whether the disposition was whimsical, cruel; . . . but to see whether it was the disposition of this man's mind at a time when in possession of his faculties." 2 Where a testator believed that he was not the father of an infant child, his soundness of mind on every other subject being conceded, the court, after a careful examination of the evidence, decided that the testator might entertain such a belief consistently with the possession of his senses, but avoided

¹ Gleespin's Will, 11 C. E. Green, 523; Hall v. Hall, 38 Ala. 131; Barnes v. Barnes, 66 Maine, 286; Lee v. Lee, 4 McCord, 183; Frowert's Estate, 2 W. N. C. 588; Cole's Will, 49 Wis. 179. The rule was applied in the latter case, although it appeared that the testator unreasonably believed that his wife was unchaste, his son illegitimate, and his brother hostile to him.

² Greenwood v. Greenwood, 8 Curt. App. (1790). This was an action of ejectment brought by a devisee of the testator, the defendant setting up as a defence the invalidity of the will by reason of the testator's incapacity. A verdict was rendered for the plaintiff.

the expression of an opinion as to whether the testator was, in fact, the father of the child.¹

§ 379. But although a testator moved by capricious, frivolous, mean, or even bad motives may disinherit, wholly or partially, his children, and leave his property to strangers, and may take an unduly harsh view of the character and conduct of his children, and his will be valid, there is a limit beyond which it will cease to be a question of harsh, unreasonable judgment, and then the repulsion which a parent exhibits to his child must be held to proceed from some mental defect, and a will which is the result of such an insane repulsion is invalid.² So in the leading case of Dew v. Clark,⁸ the testator's aversion to his daughter was held to be the result of morbid delusion existing in his mind, his conduct towards, and opinions in respect of, her being inexplicable on any ground except that of insanity. In such cases it is held that the ordinary presumption as to the continuance of insanity, once existing, will obtain; that is, if a repulsion in the testator's mind amounting to an insane delusion is shown to have existed before the execution of the will, the burden will be on the proponent to show that the delusion had become inoperative when the will was made.4

§ 380. Although it is a general rule that an insane delusion

- ¹ Bagot v. Bagot, Irish L. R. 5 Ch. Div. 72.
- ² Boughton v. Knight, L. R. 3 P. & D. 64.
- * 3 Add. Ecc. 79. See § 14, note.
- A Boughton v. Knight, ubi supra. In this case Sir J. Hannen, after stating the difficulty of the question presented, when the alleged delusion consists in "a totally false, unfounded, unreasonable, because unreasoning, estimate of another person's character," continues: "It is unfortunately not a thing unknown that parents—and in justice to women I am bound to say it is more frequently the case with fathers than mothers—that they take unduly harsh views of the characters of their children, sons especially. That is not unknown. But there is a limit beyond which one feels that it ceases to be a question of harsh, unreasonable judgment of character, and that the repulsion which a parent exhibits towards one or more of his children must proceed from some mental defect in himself. . . . Fortunately the case is rare. It is almost unexampled that a delusion consisting solely of aversion to children is manifested without other signs which may be relied on to assist one in forming an opinion on that point."

existing in the mind of a testator as to the nature and extent of the property to be devised will render the will invalid, yet where the existence of such a delusion was relied on as being evidence of the testator's insanity upon all subjects, the evidence being proffered under the general rule that the test of insanity is delusion, it was held that the existence of the specific delusion was not conclusive evidence of such general insanity, and that it was improper to select a particular instance of delusion and make it a test of the existence of general unsoundness of mind. Where a testator had, in July, 1863, sold a valuable estate, and accepted the purchasemoney in currency of the Confederate States of America, this was held no evidence of mental unsoundness, it also appearing that the testator firmly believed in the success of the Confederate cause.²

(b.) As to their Direction.

§ 381. An insane delusion existing in the mind of a testator will render invalid a will which is the direct offspring of such delusion, although the general capacity of the testator remain unimpaired. But although the testator be the subject of insane delusions upon one or more subjects, yet if the will is not in any way the result or offspring of the delusion, the testator is, in law, of sane mind for the purpose of making a will. It follows from the definition of testamentary capacity

- ¹ Gardner v. Lamback, 47 Ga. 133.
- ² Beverly v. Walden, 20 Gratt. 147.
- Dew v. Clark, 1 Add. Ecc. 279; s. c. 3 Add. Ecc. 79; American Seamen's Friend Soc. v. Hopper, 43 Barb. 625; s. c. on appeal, 38 N. Y. 619; Lathrop v. American Board of Foreign Missions, 67 Barb. 590; Merrill v. Rolston, 5 Redf. 220; Florey v. Florey, 24 Ala. 241; Cotton v. Ulmer, 45 Ala. 378; Gardner v. Lamback, 47 Ga. 133; Tawney v. Long, 76 Penn. St. 106.
- 4 Boardman v. Woodman, 47 N. H. 120; Dunham's Appeal, 27 Conn. 192; James v. Langdon, 7 B. Mon. 193; Puryear v. Reese, 6 Cold. 21; O'Neil v. Evans, 1 Am. L. J. 522; Smee v. Smee, L. R. 5 P. D. 84. See contra, Waring v. Waring, 6 Moo. P. C. C. 341; Smith v. Tebbitts, L. R. 1 P. & D. 398. These cases have been overruled repeatedly, and are not of authority. See §§ 273, 274, ante. In Pelamourges v. Clark, 9 Iowa, 1, a refusal of the court below to instruct the jury that "monomania or partial

already stated, that, in order to render the will invalid, the delusion must have had reference either to the natural objects of the testator's bounty, or to the subject-matter of the will, so as to pervert the testator's judgment and understanding in respect of the business in which he was engaged. It is held that if the will is the result of partial insanity or monomania, without which it would have been different, it cannot be sustained. The rule thus stated is believed to be sustained by the general tenor of the authorities. It has been held further that an intelligent knowledge on the part of a testator that his will will work the disherison of some of his children may not be inconsistent with the existence in his mind, at the same time, of an insane delusion to which, as a cause, the exclusion of such children from the benefits of the will may be traced.

insanity will not avoid a will unless it be shown that the will was the direct offspring of such partial insanity," appears to have been approved; but no reasons are given, or authorities cited, in support of the opinion.

- ¹ See § 362, ante.
- Stanton v. Weatherwax, 16 Barb. 259; Potts v. House, 6 Ga. 824; Fraser v. Jennison, 42 Mich. 206; Lathrop v. Borden, 5 Hun, 560. In the latter case the will in question was pronounced against, it appearing that the testator was possessed with a groundless belief that the society of masons were in a conspiracy with his friends and relatives to kill and rob him.
 - * Tawney v. Long, 76 Penn. St. 106.
 - ⁴ Bitner v. Bitner, 65 Penn. St. 347.

In Stackhouse v. Horton, 2 McCart. 202, it is said that "a person may be a monomaniac, — the subject of a partial derangement towards a particular individual, — and this derangement may be the cause of depriving such individual of the bounty of a testator, which he would have otherwise enjoyed, and yet the will be valid." The court instances such a delusion as to one — a nephew — not the testator's heir-at-law, and proceeds: "Can the validity of such a will be questioned? Cui bono? Not by the nephew. The delusion, it is true, has lost him a valuable estate; but the interposition of the court by refusing probate to the will cannot make him an heirat-law or participator in the inheritance." But it is apprehended that the view expressed in this dictum is the result of a failure to distinguish the questions, (1) is the will valid, and (2) has the party opposing it an interest to contest it. It is obvious that the mere fact that the contestant has no standing in court cannot affect the question of the validity of the will. In Cotton v. Ulmer, 45 Ala. 378, it was held to be error to instruct the jury that, to set aside a will made under an insane delusion, they must be satisfied that the testator, if sane, would have included the contestants among the legatees.

§ 382. Applying the principles stated, it appeared in a leading English case that the testator was subject to certain delusions, and the jury were directed to consider whether, at the time of making the will, he was capable of having such a knowledge and appreciation of facts, and was so far master of his intentions and free from delusions as would enable him to have a will of his own in the disposition of his property, and act upon it; and they were further directed that the mere fact of the testator's being able to recollect things, or to converse rationally on some subjects or to manage some business, would not be sufficient to show he was sane; while, on the other hand, slowness, feebleness, and eccentricities would not be sufficient to show he was insane; and that the whole burden of showing that the testator was fit at the time was on the party claiming under the will. It was held, on appeal, that these directions were substantially right, and that it was immaterial whether or not the delusions proved in the case were latent at the time of the execution of the will, since, as proved, they could not, whether latent or active, have influenced his mind in the disposition of his property. In a case where a testator, against whom a commission of lunacy was subsisting, made a will and codicil, the instructions for which were rational, the testamentary papers were properly executed, and the testator's behavior apparently sane, the evidence showed that the deceased testator had been instructed to conceal the existence of certain delusions regarding his wife and sister,² and that he acted under restraint. The existence of the concealed delusions being shown, the will was pronounced against in the Prerogative Court, and on appeal the judgment below was affirmed.8 But where the testator believed that he had been drugged in his youth, and deprived of his memory, that he was a member of the royal family (on the strength of which belief he had, in 1859, memorialized the Queen), and that he had been deprived unjustly of a large property; but it appeared, on the other hand, that he had

¹ Banks v. Goodfellow, L. R. 5 Q. B. 549.

² I. e., that his wife was guilty of indiscriminate adulteries, and that his sister was illegitimate.

Prinsep v. Dyce Sombre, 10 Moo. P. C. 232.

business capacity, and had been secretary to the committee of the treasury of the Bank of England, — the court held that the will would be valid, unless the delusions proved influenced the mind of the testator in making it, which question was left to the jury to consider. The jury finding that the party was not of sound mind, the will was pronounced against.¹

§ 383. As in deciding the question of testamentary capacity the point of time to be regarded is that of the factum, so in cases where the testator appears to have been the subject of intermittent delusions, the existence of these will not affect the validity of the will, if, at the time of the factum, the testator knew the nature and extent of his property and to whom he desired to bequeath it.2 And where a testator had been laboring under delusions for three days immediately preceding the execution of his will, and on the day following the execution destroyed himself while insane, his will was pronounced for, in the absence of evidence to show delusion actually existing at the time of the factum. Sir Herbert Jenner said: "It is admitted that in this case, as in others, the presumption of law is in favor of sanity, . . . and that it is incumbent on the party alleging the insanity to establish that state of mind." 8

¹ Smee v. Smee, L. R. 5 P. D. 84. The delusions proved to exist in this case were exceedingly gross. Thus in his memorial to the queen the memorialist averred that "King George IV. came to see your memorialist while living at Camberwell. He was but a little boy. The king walked into the parlour from the garden. His majesty took a chair, balanced it on one leg, looked under, round, and up and down the chair, then fixing his eyes upon him, said, after a little pause, somewhat contemptuously, 'What do you call this?' 'A chair.'... The king seemed moved, did not again speak, but sat down, took him upon his knee and heard him read. Some time afterwards Mrs. Smee came in, when the king with much feeling patted your memorialist on the head and said, 'Poor boy, poor boy, get on with your learning; a great destiny is preparing for you, though you do not know it.'"

² Lee v. Scudder, 4 Stew. 633.

^{*} Chambers v. The Queen's Proctor, 2 Curt. 415.

SECTION III.

WILLS MADE IN LUCID INTERVALS.

§ 384. A person habitually insane may make a valid will in a lucid interval.¹ This is the rule alike of the common and the civil law.² The question of the existence of a lucid interval is one of fact exclusively, and the circumstance that the testator made the will during the time overreached by the finding of an inquisition of lunacy pronouncing him insane,³ or while he was under guardianship as a lunatic,⁴ or while confined as insane in an asylum for lunatics,⁵ is not conclusive evidence of incapacity. But incapacity being proved to have existed before the execution of the alleged will, the burden of proof will be upon the proponents to show capacity at the very time of execution.⁶ Such capacity must be adapted to the doing of the specific act, but it need not amount to complete recovery.⁵

SECTION IV.

CAPACITY TO REVOKE WILL.

- § 385. The same degree of mental capacity is required to revoke a will as to make one. So where a person of sound mind executes a will, and afterwards, while insane, destroys
- ¹ Cartwright v. Cartwright, 1 Phill. 90; Hare v. Bryant, Ky. Dec. 270; Wright v. Lewis, 5 Rich. 212.
- ² "Furiosi autem si per id tempus fecerint testamentum quo furor eorum intermissus est, jure testati esse videntur." Institutes, lib. 2, tit. 12, sec. 2.
 - * See § 194 et seq, ante, and cases cited.
- ⁴ See § 196, ante, and cases cited. A fortiori, if a person is placed under guardianship as a spendthrift, he is not thereby disqualified from making a valid will. Jenckes v. The Court of Probate, 2 R. I. 255.
- ⁵ Nichols v. Binns, 1 Sw. & Tr. 239; Bootle v. Blundell, 19 Ves. 508; Eldon, C., in M'Adam v. Walker, 1 Dow, 148.
- ⁶ See §§ 187, 188, ante, and cases cited; Cartwright v. Cartwright, 1 Phill. 90; Billinghurst v. Waters, id. 187; Wood v. Wood, id. 857.
- ⁷ See § 17, ante, and cases cited, and contra, Aubert v. Aubert, 6 La. Ann. 104.

it, or directs it to be destroyed, the devises contained in the will remain operative, and the will may be proved in like manner as other facts are proved. In such a case the testimony of the subscribing witnesses is held to be not essential to the proof.² A fortiori, a will executed by a sane man, and afterwards mutilated or defaced by him while insane, is to be pronounced for as it existed in its integral state, that being ascertainable.8 The presumption that a will which has been in the testator's custody up to his death, and cannot afterwards be found, or is found mutilated, was destroyed or mutilated by him animo revocandi, does not apply to the case where the testator became insane after the execution of the will, and so continued till his death; but the burden of showing that the will was destroyed or mutilated while the testator was of sound mind lies on the party setting up the revocation, and in the absence of evidence as to the date of the destruction or mutilation the contents of the will are entitled to probate.4 This rule was applied although it appeared that the will had been in the testator's custody for a short time subsequent, as well as prior, to his insanity.⁵ So if it appear that a will executed when the testator was of sound mind was afterwards altered by him while insane, the will may be admitted to probate after being restored to the state in which it was at the time of execution.⁶ But in the case of a holographic will, which the testator while insane had placed among his valuable papers, it was held that, in order to give the will effect, proof was necessary of an intelligent retention of it in such depository during a lucid interval, in order to give such retention the effect of a publication, and that it would be stating the rule too strongly to say that such retention was conclusive proof that the testator intended the instrument for his will.7

- ² Ford v. Ford, 7 Humph. 92.
- ⁸ Scruby v. Finch, 1 Add. Ecc. 74.
- 4 Sprigge v. Sprigge, L. R. 1 P. & D. 608.
- ⁵ Harris v. Berrall, 1 Sw. & Tr. 153.
- 6 Bicknell, in the goods of, 3 Add. Ecc. 281.
- 7 Porter v. Campbell, 2 Baxt. 81; and see 1 Redf. Wills, 873. A tes-

¹ Allison v. Allison, 7 Dana, 94; Batton v. Watson, 13 Ga. 68. See Burns v. Burns, 4 S. & R. 195.

SECTION V.

THE WILL AS EVIDENCE OF CAPACITY.

§ 386. The general principles determining the competence and effect of the act itself, considered as evidence bearing upon the question of the mental condition of the doer, have already been stated.¹ But as the question of the effect of the intrinsic evidence afforded by the will itself is often discussed in cases involving testamentary capacity, it is proper to consider in this place the rules which are applied to such cases. It is a general rule that although a will may by its provisions furnish intrinsic evidence involving it in suspicion, and tending to show the incapacity of the testator to make a disposition of his estate with judgment and understanding, as, for instance, if he dispose of the estate to the exclusion of near and dear relatives, yet such intrinsic evidence will not of itself furnish ground for setting aside the instrument; 2 for,

tator devised to his wife all his ready money and bank-notes which he should have about his person or at his residence at his death, and devised, specifically, to others, his exchequer bills, stock, &c. He became insane two years before his death, and during that time two large sums of money, amounting to near £3,000, which had been paid at his house, were laid out for him in stock and exchequer bills. It was held that this was a due application of the money, and that the specific legatees of the stock and exchequer bills were entitled to it. Browne v. Groombridge, 4 Madd. 495.

- 1 See §§ 225. 227-229, ante, notes, and cases cited.
- ² Davis v. Calvert, 4 Gill & J. 269; Cramer v. Crumbaugh, 3 Md. 491; Herbert v. Watson, 24 La. Ann. 385; Wheeler v. Alderson, 3 Hagg. Ecc. 574. In the case of Waring v. Waring, 6 Moo. P. C. C. 341, a will written sua manu by a person without children, who in early life had been eccentric, and later had developed unsound delusions, which will conferred great benefits on a stranger, was pronounced against, on the ground of the injustice of its provisions; although it betrayed on its face no marks of insanity. But this case is not of authority, since it rests upon a doctrine that is now nowhere accepted. See §§ 273, 274, ante.
- "The rule [of the English ecclesiastical courts] that where capacity is at all doubtful there must be direct proof of instructions, only applies, or at least only applies with any degree of stringency, where the instrument is inofficious, or where it is obtained by a party materially benefited, or, a fortiori, where it is both." Per Sir John Nichol, in Brogden v. Brown, 2 Add. Ecc. 441.

unless this carries upon its face clear marks of being the product of an unsound mind, neither its injustice, nor its unreasonableness, nor moral obliquity, nor prejudice exhibited in it, creates any presumption of want of capacity.¹

§ 387. Thus where it appeared that an Englishman who had resided for many years in India and become imbued with eastern notions, and professed himself at different times a believer in the Hindoo and Mahommedan faiths, had, by his will, excluded his brother (his only next of kin) from any benefit except a small legacy, and after making several specific bequests devised the residue of his property to the Turkish ambassador in London, to be applied for the benefit of the poor of Constantinople, and for the erection of a cenotaph to himself at Constantinople, the Judicial Committee of the Privy Council, referring, apparently with some doubt, to the case of Waring v. Waring,2 held that the true test of capacity was to be found by looking into the testator's previous habits and opinions, and that though the provisions in the will might be irrational in an English christian they were not necessarily so in the case of the testator, and accordingly pronounced in favor of the will.8

§ 388. But although the eccentricity, or the apparently unjust and unreasonable inequality of its provisions, will

¹ Boylan v. Meeker, 4 Dutch. 274; Den v. Gibbons, 2 Zab. 117; Van Pelt v. Van Pelt, 30 Barb. 131; Le Bau v. Vanderbilt, 8 Redf. 384; Fountain v. Brown, 38 Ala. 72; Mosser v. Mosser, 32 Ala. 551; Horback v. Denniston, 3 Pitts. 49; Boughton v. Knight, L. R. 3 P. & D. 64. In Harrel v. Harrel, 1 Duval, 203, it was said that gross inequality in the dispositions made by a will, where no reason is suggested for it in the will itself, requires satisfactory evidence that it was the deliberate offspring of a rational, self-poised, and clearly disposing mind; but this expression may be considered obiter dictum, since there was in the case evidence of want of capacity, aside from the intrinsic evidence in the will itself. But, however considered, the expression does not state correctly the rule of the Kentucky law upon the subject. See Broaddus v. Broaddus, 10 Bush, 299, where an instruction given in the same terms was condemned as being misleading and calculated to divert the minds of the jury from the issue to the circumstance of the inequality of the devises. And see also Kevil v. Kevil, 2 Bush, 614.

See note to § 386.

⁸ Austen v. Graham, 8 Moo. P. C. C. 493.

not alone be sufficient to invalidate a will, yet these, in conjunction with other testimony tending to show the testator's incapacity, will become competent as evidence on the issue of capacity. So proof that the testator was at the time of the factum in a condition of extreme bodily weakness and subjected to undue influence, or even that the will was made in extremis, its provisions being exclusively in favor of those about him, will, it is said, make the intrinsic evidence afforded by its provisions of consequence in determining the question of capacity.2 And it has been held where a disease ultimately affecting the mind was insidious and slow in its development, and there was ground for suspicion that, previous to the factum, apprehensions were entertained of the possible approach of mental derangement in the party, that there should be a careful scrutiny of a testamentary act performed shortly before an accession of undoubted symptoms, in order to see whether it was a rational and natural act, conformable to the views and wishes of the party when in a state of health. And where a will is alleged to have been made in a lucid interval by one habitually insane, the nature and character of the instrument will be considered in determining the question of the decedent's capacity at the time of the factum.8

§ 389. On the other hand, the fact that a will is reasonable in its provisions will, in cases where the testator's capacity is disputed, strengthen the natural inference in favor of sanity. And if such a will is in the handwriting of the testator, it is obvious that this fact will carry with it a strong, though not a conclusive, inference of capacity. It has been held that if a will contain nothing "sounding to folly," the presumption will be, even in the case of one habitually insane, that

¹ Kevil v. Kevil, 2 Bush, 614; Munday v. Taylor, 7 Bush, 491; Broaddus v. Broaddus, 10 Bush, 299; Evans v. Arnold, 52 Ga. 169; Young v. Barner, 27 Gratt. 96; Fountain v. Brown, 38 Ala. 72.

² Goble v. Grant, 2 Green Ch. 629; Brydges v. King, 1 Hagg. Ecc. 256.

⁸ Gombault v. Public Administrator, 4 Bradf. 226.

⁴ Tompkins v. Tompkins, 1 Bailey, 92; Pancoast v. Graham, 2 McCart. 294.

it was executed in a lucid interval.¹ But under the rule of the common law that insanity once existing is presumed to continue, and that the burden of proof to show a lucid interval is upon the party alleging it, it would seem that the fact that a will is reasonable in its provisions, while it may be of weight as evidence upon the issue of capacity, cannot control the legal presumption or shift the burden of proof to the contestant.²

1 Kingsbury v. Whittaker, 32 La. Ann. 1055, where the authorities of the civil law bearing upon the point are cited. In M'Daniel's Will, 2 J. J. Marsh. 331, it was held that rationality and equality of the dispositions in a will made in legal form and without dictation were conclusive of the testator's sanity. And see, to the same effect, Scruby v. Finch, 1 Add. So in Temple v Temple, 1 Hen. & Mun. 476, it was said that the circumstance that a will was wholly written by the testator himself is prima facie evidence that he was in his senses and able to make a will at the time of writing the same; so that the onus probandi to repel that presumption is on those who wish to impugn it. These expressions appear to be confused and misleading, since it is generally held that, in the absence of positive evidence to the contrary, the testator's sanity is to be presumed, vide § 177, ante; in which case the presumption of law does not rest on affirmative evidence of sanity. On the other hand, if evidence of insanity appear, the expressions criticised are objectionable as giving conclusive effect to evidence, the weight of which is always for the jury.

² See §§ 180-185, ante.

CHAPTER XII.

CONVEYANCES OF INSANE GRANTORS.

SECTION I.

CAPACITY TO CONVEY.

§ 390. It having been held, formerly, that the words non compos mentis implied a total deprivation of sense,1 it was further held that, in order to invalidate a deed on the ground of the grantor's insanity, such a total deprivation on the part of the grantor should be shown.2 But the modern rule being, as heretofore stated, that, in order to invalidate the contract of one alleged to be insane, it must appear that such insanity subsisted in respect of the subject-matter of the contract, it follows that, in order to avoid a deed on the ground of the grantor's insanity, it must be shown that the grantor was at the very time of the conveyance subject to insane delusion influencing him to do the act, or that he had lost the faculty of reasoning intelligently upon any subject.8 Thus proof of monomania or specific delusion existing in a grantor will not be sufficient of itself to invalidate his deed, unless the jury are of opinion that the monomania or delusion was of such a nature as to influence him in the disposition of his property. The court in New Hampshire say: "It seems not an uncommon opinion of medical men and others that if insanity is clearly proved to exist in any degree, the party can no longer be safely regarded as capable of transacting any business. . . . We are unable to adopt this opinion, because we think there

¹ See § 1, ante.

² Beverley's Case, 4 Coke, 128; Co. Litt. 247 a; and see Hill v. Nash, 41 Maine, 585; Mulloy v. Ingalls, 4 Neb. 168.

⁸ The same degree of capacity is essential in order to execute a valid power of attorney to convey land as is required to render valid a specific conveyance of the land. Hall v. Unger, 4 Sawyer C. C. 672.

is abundant evidence that the species of insanity called monomania may be limited to certain subjects, . . . without sensibly affecting the general capacity in other respects, and that the mind and memory may be greatly impaired, and yet the person be capable of disposing of property when there has been no fraud or undue influence." 1 So although one be insane upon all subjects, yet his deed will be valid if made in a lucid interval, or if it be shown that he had, in fact, capacity to convey at the time of execution.2 Where general weakness of mind exists, not amounting to insanity, such weakness will not of itself be sufficient to avoid the deed of its subject; and it is held, where the mental capacity is of that degree that a jury would not be justified in finding the subject insane upon an issue of insanity, that a court of equity will not set aside his conveyance, unless an unconscientious advantage has been taken of the weakminded person to obtain a conveyance without sufficient consideration.8

¹ Dennett v. Dennett, 44 N. H. 531, opinion by Bell, C. J. See also Fenton v. Armstrong, 4 Ir. Law Recorder, N. s. 167; Hovey v. Hobson, 55 Maine, 256; § 270, ante, and cases cited. In Creagh v. Blood, 2 Jones & La T. 509 (1845), Sir Edward Sugden seems to have considered it an undecided question — a deed having been executed by one who was insane upon particular subjects — whether the jury, being satisfied of the existence of the morbid feeling at the time of the execution of the deed, though not then called into activity, were at liberty to say that as the lunatic was reasonable in all other respects his deed was valid, and further, whether if one be partially insane, and that partial insanity be never removed from his mind, he is capable of entering into solemn acts which he would not have entered into if the subject of his delusion had been touched upon. See also Alston v. Boyd, 6 Humph. 504. But it is apprehended that the rule stated in the text is sanctioned by the weight of modern authority. It has been held no error for a judge to instruct the jury that if the grantor at the time of the execution of a deed was suffering from monomania caused by the marriage of his daughter, and the deed was the result of such monomania, the jury should set the deed aside. Lemon v. Jenkins, 48 Ga. 313. Where a grantor knew that he was making a deed, and understood what its effect would be, but was rendered entirely indifferent to property by an insane delusion that he or others who were affected injuriously by the deed were about to perish, so that he was incapacitated from a rational care for his interest or theirs, it was held that the deed might be avoided. Bond v. Bond, 7 Allen, 1.

² Towart v. Sellers, 5 Dow, 231.

⁸ Jackson v. King, 4 Cow. 207; Odell v. Buck, 21 Wend. 142; Sprague

§ 391. In respect of the degree of intellectual capacity in a grantor requisite to render his conveyance of real estate valid, the general rule is laid down, that ability to execute and deliver a deed, understanding and comprehending the nature of the act, the consideration to be paid, and that the grantor was thereby transferring the title to his property to the grantee and the consideration to himself, indicates sufficient soundness of intellect in the grantor to make the conveyance valid, though it be uncertain whether his mind was in all respects, and absolutely, sound. On the other hand, if the grantor have not capacity equal to a full and clear understanding of the nature and consequences of his act in making the conveyance, such a conveyance is invalid.2 Old age, of itself, does not create incapacity to convey; and in a case where deeds were made by an old man shortly before his death, conveying all his property not before disposed of to one of his sons, it was held that the principle applicable to last wills, in respect of the state of mind and degree of capacity sufficient to make a valid devise, was applicable, and that if the grantor was capable of recollecting the property he was disposing of, the manner of its distribution, and the objects of his bounty, so as to make a valid will, he would be considered as having capacity to convey by deed.4

v. Duel, Clarke, 90; s. c. 11 Paige, 480; Corbit v. Smith, 7 Iowa, 60; and see cases cited in Note following § 278.

1 Hovey v. Hobson, 55 Maine, 256; and see Dennett v. Dennett, 44 N. H. 531; Bond v. Bond, 7 Allen, 1; Carpenter v. Carpenter, 8 Bush, 283: Kennedy v. Marrast, 46 Ala. 161; Titcomb v. Vautyle, 84 Ill. 371. In Crowther v. Rowlandson, 27 Cal. 376, proof that at the time a grantor delivered a conveyance of property to the grantee he was incapacitated from taking a rational care of his property by reason of mental delusion, was held to be sufficient to justify the court in setting aside the conveyance on the ground of the insanity of the grantor. Sanderson, C. J., dissented from this view, on the ground that the plaintiff did certain sane acts during the period when he alleged he was insane, that the law does not distinguish between different degrees of intelligence, and that, in the absence of fraud, proof of mere imbecility in the mind of the grantor, however great, will not avoid his deed. See § 390, ante.

- ² Dicken v. Johnson, 7 Ga. 484.
- ⁸ See ch. xi. sec. i., ante.
- ⁴ Greer v. Greer, 9 Gratt. 330; and see Walton v. Northington, 5 Sneed, 282.

§ 392. As in the case of simple contracts and wills, so, when the validity of a deed is impeached on the ground of the grantor's incapacity, the condition of his mind at the very time of the execution of the deed in question becomes the subject of inquiry, and evidence of his mental condition at other times is incompetent except in so far as this is connected with the time of execution. It is held that mere nervous excitement existing in the mind of the grantor at the time of the execution of his deed will not be sufficient to defeat its operation.2 In a case where it was held that a person, although weak in body and feeble in mind, and adjudged by an inquisition to have been of unsound mind at the time of the factum, might make a valid mortgage, it was further held that such a mortgagor would be precluded from interposing the defence of usury against one who had purchased the mortgage upon the faith of an affidavit made by the mortgagor that it was a good and valid security.8

§ 393. A person deaf and dumb from his nativity is not, by reason of his infirmity alone, incapacitated from making a valid deed, it being said that whether the difference between a deed and a will, or between a deed with covenants and one without, could be communicated to, and understood by, such a person, by means of appropriate signs, is of no importance in relation to the validity of the deed, provided the grantor had sufficient capacity to make, and knew that he was making, a conveyance of his estate. In respect of conveyances made by intoxicated persons, it is apprehended that the validity of these will be determined by an application of the rules which obtain in cases of simple contracts made by such persons; that is, in order to avoid such a conveyance it must be made to appear that the intoxication destroyed the grantor's understanding of the subject-matter of the contract.

¹ See §§ 281, 232, ante, and cases cited.

² Darby v. Hayford, 56 Maine, 246.

⁸ Hirsch v. Trainer, 3 Abb. N. C. 274.

⁴ Brown v. Brown, 3 Conn. 299; and see Elyot's Case, Carter, 53, citing Hill's Case; § 9, ante.

⁵ See §§ 295, 296, ante, and cases cited.

SECTION II.

DEEDS OF INSANE GRANTORS AS VOID OR VOIDABLE.

(a.) In General.

§ 394. At common law the conveyance of one insane, if made by matter of record, was neither void nor voidable. And it was said by Lord Denman to be settled law that if a lunatic levies a fine, neither he nor those who represent him shall avoid it.2 So in an early case it was held that a fine levied by an idiot was not voidable although the idiocy were apparent, and although, after the fine was levied, he was found by inquisition to have been an idiot ex nativitate. It was further held in the same case that the indentures executed by the idiot were sufficient to direct the uses of the fine.8 But it would seem that a fine of lands might be avoided in equity for the insanity of the cognizor, though not at law.4 Upon a similar principle to that stated it was held that a several title acquired under a judgment of a court of record, in partition, was neither void nor voidable; and the rule is said to apply generally to titles acquired under statutes, recognizances, statutory acknowledgments, and the like, since to these proceedings are attached a solemnity and importance which does not belong to matter in pais.6 At the present day it is apprehended that the liability of an insane person under an act of record will be determined by similar equitable considerations to those which determine such a person's liability for acts in pais.7

- ¹ Snowden v. Dunlavey, 11 Penn. St. 522, opinion by Gibson, C. J.
- ² Murley v. Sherren, 8 Ad. & El. 754; and see Beverley's Case, 4 Co. 123 b.
 - * Mansfield's Case, 12 Coke, 123.
- ⁴ Addison v. Dawson, 2 Vern. 678; Wilkinson v. Brayfield, id. 307; Milner v. Turner, 4 Mon. 240; 1 Fonbl. Eq. iv. 52. See § 400, post.
 - ⁵ Snowden v. Dunlavey, ubi supra.
 - ⁶ See Pope, Lun. 232.
- ⁷ In Murley v. Sherren, ubi supra, Lord Denman declined to express any opinion as to the relief which a court of equity might be competent to give as against a fine levied by an insane cognizor. See Addison v. Dawson and other cases cited supra; Pope, Lun. 233.

- § 895. Although some of the earlier cases held that the conveyance of an insane person, if by deed, was absolutely void, yet this rule was not applied to cases where such conveyance was by feoffment and livery of seizin. It is said that "in England it appears to be well settled, as it is in this country where the common law has not been abrogated by statutory enactments, that the feoffment of a lunatic or idiot in person is only voidable and not void." The court further say: "In this state [Maryland] . . . livery of seizin has been abolished and . . . enrolment is equivalent to it." And so a "deed of bargain and sale of a lunatic executed and duly enrolled would be voidable only and not void." It was accordingly held in the same case, where an estate was devised to one in tail, and, if he died without heirs of his body, then to another in tail, and the first tenant in tail conveyed the land in fee by deed of bargain and sale and then died, that the remainder-man could not impeach the deed on the ground that at the time of its execution the bargainor was non compos mentis.2 And it would seem that wherever a deed contains a covenant, or is accompanied by livery of seizin, that it is to be held voidable and not void.8
- § 396. It was held in Beverley's Case that every deed, feoffment, or grant made by any man non compos mentis was avoidable, but not by himself; 4 and the weight of modern au-
- ¹ Thompson v. Leach, 12 Mod. 173, where it is said that the reason is "the notoriety and solemnity" of the feoffment. And see Sheffield & Ratcliff's Case, Godbolt, 300.
- ² Key v. Davis, 1 Md. 32; and see Shelf. Lun. 255; Pope, Lun. 233; Beverley's Case, 4 Co. 123 b; 2 Roll. Abr. 2 (E.) pl. 2; Snowden v. Dunlavey, 11 Penn. St. 522; Desilver's Estate, 5 Rawle, 111, where it was held that as the feoffment and livery of a lunatic or madman are not void but voidable, and as they work a divestiture of his seizin, so they preclude the possibility of an escheat by his death, because seizin must be found at his death, as well as failure of heirs, devisees, or known kindred; and though escheats take effect in Pennsylvania, not on principles of tenure, but by force of the statutes, yet these statutes require the decedent to have been seized at his death.
- * Wait v. Maxwell, 5 Pick. 217, where the deed in question contained a covenant of seizin, and was held, accordingly, to be voidable only. See also opinion of Shaw, C. J., in Arnold r. Richmond Iron Works, 1 Gray, 434.
 - ⁴ Beverley's Case, 4 Coke, 123 b. The limitation of the rule by Lord

thority is in favor of the rule that the deeds of insane persons, in whatever form these may be made, are merely voidable and not absolutely void.¹ Since the grants of infants and insane persons are considered as parallel, both in law and reason,² it will be found that there is a common principle on this subject applicable to the inability of the grantor in a deed, whether such inability arises from lunacy or infancy; and both the civil and the common-law writers group together idiots, madmen, and infants as parties incapable of contracting for want of a rational and deliberate consenting mind.³ The rule is held to apply as well to unrecorded deeds as to feoffments and deeds recorded.⁴

Coke to the grantor's representatives or privies in blood was a result of an application of the other rule, now obsolete, that a party shall not be permitted to plead his own incapacity in avoidance of his act. See §§ 142-144, ante.

1 Allis v. Billings, 6 Met. 415; Seaver v. Phelps, 11 Pick. 304; Key v. Davis, 1 Md. 32; Jackson v. Gumaer, 2 Cow. 552; Jackson v. Burchin, 14 Johns. 124 (but see Van Deusen v. Sweet, 51 N. Y. 378, as cited post, § 400); Eaton v. Eaton, 8 Vroom, 108; Yauger v. Skinner, 1 McCart. 389; Breckenridge v. Ormsby, 1 J. J. Marsh. 236; Riggan v. Green, 80 N. C. 236; Thomas v. Hatch, 3 Sumner, 170; Tucker v. Moreland, 10 Pet. 58; Crouse v. Holman, 19 Ind. 30; Somers v. Pumphrey, 24 Ind. 231; Musselman v. Craven, 47 Ind. (overruling Brown v. Freed, 43 Ind. 253); Freed v. Brown, 55 Ind. 310; and see English and American cases cited post, sec. v.

In Price v. Berrington, 3 Mac. & G. 486, Lord Cottenham queried whether the deeds of one insane were absolutely void or only voidable; but the decision of this point was not necessary to the determination of the case, which was a bill filed to set aside a deed on the ground of the lunacy of the grantor and other collateral circumstances of fraud, which collateral circumstances were not proved. The bill was dismissed on the ground that it is an established doctrine of equity law that where a bill sets up a case of fraud as a ground for relief, and such fraud is not proved, the plaintiff is not entitled to relief by establishing some other fact independent of the fraud, which might of itself create a title to relief under a head of equity distinct from that applicable to the case of the fraud alleged.

- ² Thompson v. Leach, 3 Mod. 310.
- * Allis v. Billings, 6 Met. 415. See Story Eq. Jur. § 223.

In Zouch v. Parsons, 8 Burr. 1794, the question whether an infant's conveyance by lease and release was absolutely void, or only voidable, was elaborately discussed by Lord Mansfield, and it was decided that such a conveyance was voidable only.

4 Allis v. Billings, ubi supra.

(b.) After Office Found.

§ 397. The English courts, in conformity to the rule here-tofore laid down, that the finding of insanity by an inquisition or other competent tribunal is only prima facie evidence of such insanity in collateral proceedings, now hold uniformly that a deed, though overreached by the finding of an inquisition in lunacy, is not therefore necessarily void. So the court has refused to set aside deeds executed by a grantor while kept in restraint as an insane person in a lunatic asylum under proper medical certificates. It has been held in England, since the party claiming under a deed is not bound in general to prove the sanity of his grantor, that a deed overreached by a finding in lunacy is not even prima facie void; but this latter view of the law does not appear to be supported by the tenor of the decided cases.

§ 398. The English rule that a finding of insanity does not necessarily render the subsequent conveyances of its subject void obtains in those states where, as in England, the committee or guardian of the lunatic is regarded as a mere bailiff or curator of the estate, and as having no estate therein which he may legally convey. Thus in New Jersey it is held that the evidence of the finding of the inquisition is by no means conclusive of the question of incapacity to make a deed.⁵ And in those jurisdictions where the statute law makes the insane person incapable of entering into a valid contract, the provisions of the law will be limited in their effect as closely as their just interpretation will allow. Thus under a statute providing that "every contract, sale, or conveyance of any person while a person of unsound mind shall be void," ⁶ was

¹ See § 194, ante, and cases cited.

² Sergeson v. Sealey, 2 Atk. 412; Niell v. Morley, 9 Ves. 478; Frank v. Mainwaring, 2 Beav. 115; 1 Dan. Ch. Pr. *108; cases cited § 197, ante.

Selby v. Jackson, 6 Beav. 192.

⁴ Jacobs v. Richards, Jacobs v. Porter, 18 Beav. 300. See note to § 197, ante, for a fuller discussion of these cases, and also Campbell v. Hooper, 3 Sm. & Gif. 153, as cited post, § 412.

⁵ Hunt v. Hunt, 2 Beas. 161. See also Yauger v. Skinner, 1 McCart. 389, and cases cited ante, § 197.

⁶ 2 R. S. Ind. c. 2, § 11 (1852).

held to apply only to a person of unsound mind so found in the manner prescribed by the statutes.¹ And a statute providing that the deed of one duly found to be insane should be absolutely void ² was held not to apply to deeds made before the grantor had been found insane in proceedings instituted for that purpose.⁸

§ 399. Generally, however, in those states where conveyances of insane persons are by statute declared to be void, or where the committee or guardian of the insane person is considered as invested with the legal estate of his ward, it has been held that conveyances made by the latter, after office found and the appointment of a committee or guardian, are absolutely void. Thus in Massachusetts the decree and letters of guardianship are held to take from the insane ward all capacity to convey, so that any conveyance of the ward will be void; and a similar rule obtains in Maine 4 and, apparently, in Pennsylvania.⁵

§ 400. In New York, upon the institution of proceedings to determine the insanity of a party, both the person and estate of the party are considered to be within the exclusive custody and jurisdiction of the court; 6 and it follows that conveyances thereafter executed by the supposed lunatic to one having notice of the lunacy proceedings will, if such proceedings result in a determination of lunacy, be absolutely void. And where one purchased real estate and took a conveyance thereof with full knowledge that proceedings had been instituted in the Court of Chancery against the grantor as an habitual drunkard, that a commission had been issued to inquire as to his incapacity to manage his affairs, and that the sheriff was then summoning a jury to try the inquisition, the conveyance was set aside, with costs, on a bill filed by the committee

¹ Crouse v. Holman, 19 Ind. 30.

² 2 R. S. Ind. (1876), p. 601.

⁸ Musselman v. Craven, 47 Ind. 1; Freed v. Brown, 55 Ind. 810; and see § 278, ante.

⁴ Wait v. Maxwell, 5 Pick. 217; Hovey v. Hobson, 53 Maine, 451. But the deeds of insane persons not under guardianship are voidable merely. Ibid.

⁵ Rogers v. Walker, 6 Penn. St. 371.

⁶ See §§ 31, 34, ante.

⁷ Van Deusen v. Sweet, 51 N. Y. 378.

of the person and estate of the drunkard. So a contract for sale of real estate executed by a person who has been, upon inquisition, found to be a lunatic, and of whose person and estate a committee has been duly appointed, being absolutely void, no action can be maintained thereon by the committee; nor can the latter by any act of his in ratifying or adopting it, without the authority and direction of the court, make such a contract good.² But it is apprehended that generally in New York the deeds of insane persons executed before office found will be held to be voidable only and not void.8 As to conveyances executed by the lunatic or drunkard before the issuing of the commission, and which are overreached by the retrospective finding of the jury, the inquisition is only presumptive, but not conclusive, evidence of incapacity.4 Where the conveyance of a purchaser is so overreached, the court, upon good cause shown, may permit the purchaser to traverse the finding of the inquisition, upon his stipulating to be bound by the final decision upon the traverse.⁵

- ¹ Griswold v. Miller, 15 Barb. 520.
- ² Fitzhugh v. Wilcox, 12 Barb. 235.
- * Jackson v. Burchin, 14 Johns. 124; Same v. Gumaer, 2 Cow. 552. In Van Deusen v. Sweet, 51 N. Y. 378, it appears to have been held, broadly, that deeds executed by persons non compotes mentis are absolutely void, and that the insanity of the grantor in such a deed may be shown by any person entitled to defeat a claim under it, although such insanity had not been judicially determined prior to the execution of the deed. And it was added that an equitable action need not be resorted to to set aside such a deed. And the court cited with approval Rogers c. Walker, 6 Penn. St. 371. See § 399. But it is to be observed that under the rule in Griswold v. Miller and Fitzhugh v. Wilcox, ubi supra, these expressions were unnecessary to the determination of the case, since the deed the validity of which was in question was executed after office found. Moreover, the court declared correct the charge of the judge in the court below to the effect that the deed might be voidable by reason of the grantor's weakness of intellect, although it might not be entirely void; and that if the jury found from the facts in the case that his mind was so weak that he did not know or appreciate what he was doing, that he did the act mechanically without appreciating its force or effect, or that his mind did not assent either to the execution or delivery of the deed, then they might find that the deed was a nullity.
- ⁴ L'Amoureaux v. Crosby, 2 Paige, 422, 427; Osterhout v. Shoemaker, 3 Hill, 513.
 - ⁵ Christie, in re, 5 Paige, 242.

§ 401. Since at common law the deed of land of a married woman in which her husband does not join is absolutely void, it was held, under a statute providing that such deeds should be valid if the husband should join therein, that if the assent required in order to render the deed effectual was given by the husband while insane, such a deed would be not voidable merely, but absolutely void. In deciding this question in Massachusetts the court said: "The deed was void to the same extent as if there had been no assent by the husband, and no subsequent action or failure to act on his part could give it validity. The cases cited by the tenant to the point that the deed or other contract of an insane person is voidable only, and may be ratified by him after he becomes sane, do not apply to this case. No subsequent assent or ratification by the husband could fulfil the requirements of the statute, or give validity to the deed as the deed of the wife." 1

(c.) Conveyances without Consideration, Void.

§ 402. The rule that dealings of sale and purchase by one apparently sane, though subsequently found to be insane, will not be set aside as void against those dealing with him in good faith, is inapplicable to the case of deeds of settlement made by an insane settlor; and it is held that such a settlement ought to be set aside in equity, even though reasonable and for the convenience of the settlor's family.² The reason of the rule rests upon the consideration that a deed of settlement not being made, ordinarily, for a valuable consideration, no equities arise in behalf of the persons to be benefited by the deed, so superior to those of the settlor's heir-at-law as to call for the protection of a court of equity. Thus where

Leggate v. Clark, 111 Mass. 308. Now, in Massachusetts, a married woman may dispose of real property in the same manner as if she were sole, except that she may not, without the written consent of her husband, destroy or impair his tenancy by the curtesy in her real estate. Pub. Sts. c. 147, § 1. Where the estate of a married woman had been regularly sold with the consent of her husband, the conveyance executed by him and the purchase-money paid, the court refused to prevent the wife from levying a fine because her husband had since the sale become insane. Stead v. Izard, 1 Bos. & P. N. R. 312.

² Clark v. Clark, 2 Vern. 412.

a lunatic tenant in tail of copyholds having executed powers of attorney, first, to procure her admission as tenant in tail in the several manors of the copyholds, and, second, to surrender them after admission and take a readmission in fee, it was held by Lord Cranworth that the transaction was invalid, and that the estate tail was not barred; though, at the instance of a creditor disputing the lunacy, an issue was directed as to whether the lunatic was, at the time of her executing the powers of attorney, of sound mind. The Lord Chancellor, after admitting the general rule that dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside as against those who have dealt with him in the faith of his being a person of competent understanding, remarks that the reason of the rule does not apply to such voluntary acts on the part of the insane person as are unsupported by any consideration.1

§ 403. But where one entitled to real estate settled it in strict settlement, and after his death his heir-at-law, who was also tenant for life under the settlement, upon his marriage and by an indenture reciting the settlement, conveyed all his interest in trust for the purpose of securing a provision for his wife; it was doubted whether he could be allowed afterwards to insist that the settlement was void by reason of the mental incapacity of the settlor at the time of the settlement.² The same considerations which are applied to cases of settlements would seem to justify the rule laid down in the early cases, that a surrender of lands executed without any, or any sufficient, consideration by an insane person is absolutely void.⁸

¹ Elliot v. Ince, 7 De G. Mac. & G. 475.

Roddy v. Williams, 3 Jones & La T. 1. Where A. by deed directed his attorney in fact to pay annually out of the income of his estate a certain sum to B. during the joint lives of A. and B., and A. afterwards became insane, it was held that in law the deed was the grant of an annuity and not revoked by A.'s insanity. Blount v. Hogg, 4 Jones Eq. 46. Where one had covenanted to surrender copyholds to the uses of a settlement upon his daughter's marriage, and died leaving a lunatic heir, it was held that the surrender could not be made under the St. 4 Geo. II. c. 10. Currie, ex parte, 1 Jac. & W. 642.

^{*} Anonymous, Freeman, 508; Leach v. Thomson, Shower, 150, and cases cited arguendo; Thompson v. Leach, 1 Ld. Ray. 315; s. c. 2 Salk. 427. But see Zouch v. Parsons, 3 Burr. 1794, 1807.

SECTION III.

DEEDS, HOW RATIFIED.

- § 404. If it be sought to establish the fact that a deed. voidable by reason of its being the outgrowth and result of the grantor's insanity, has been ratified by him on his restoration to sanity, it must appear that the ratification was the intelligent act of the grantor, knowing that he was acting under the contract contained in the deed, and intelligently availing himself of its provisions in his favor. But, as in the case of deeds made by infant grantors, proof of express and formal ratification is not necessary to render the deed valid; and such ratification may be inferred if the grantor, after his recovery, take advantage of the agreements, beneficial as to him, contained in the contract of conveyance. Thus payment and acceptance of the compensation fixed by the contract are conclusive evidence of the grantor's election to confirm the deed. And where a grantor, after being restored to his right mind, and knowing that his grantee was in possession of the land under the deed, did not enter upon the land, nor give notice of his intention to avoid the conveyance, but received payment of the notes for the price given him while insane, his intention to ratify the deed was inferred, although at the time of receiving such payment he did not know that he had the power of avoiding the deed, and that by receiving payment he would relinquish such power.2
- ¹ Bond v. Bond, 7 Allen, 1. It was held in this case that the ratification of a deed executed during the grantor's insanity would not make the deed effectual as against a prior deed of the grantor, executed while he was sane, and recorded after the formal execution, but before the ratification, of the second deed.
- ² Arnold v. Richmond Iron Works, 1 Gray, 434. In Jones v. Evans, 7 Dana, 96, the court said: "If it were conceded that a deed delivered by a lunatic . . . could be rendered valid only by a re-execution or redelivery when the person had attained his proper senses, yet when weakness of mind only is his frailty, not amounting to actual lunacy, his recognition, sanction, or confirmation of the act when he attains his perfect senses will certainly suffice to render the deed valid." It is held that a deed left unconditionally with a third person for the use of a grantee,

§ 405. In Arnold v. Richmond Iron Works, Shaw, C. J., said: "It was argued that the plaintiff should not be bound in case of the ratification of a contract made whilst of unsound mind, without affirmative proof that he knew he had the power of avoiding his deed, and that, by demanding and receiving payment of his notes, he would relinquish that power. This is not tenable, unless a man of sane mind may set up his ignorance of the law to excuse himself from liability on his contracts. Could a man who should give a promise in writing to pay a debt of more than six years' standing avoid his acknowledgment and promise by averring that he did not know that in point of law he had a good bar to the note on the statute of limitations? We think not." The rule thus implied is accepted, generally, as sound; 1 but in a later case, also occurring in Massachusetts, its application would appear to be limited to cases in which the grantor, by his recovery, becomes able, during his life, intelligently to ratify his act. In the later case it appeared that the grantor in a deed was insane at the time of its execution, and died without being restored to reason, and that no entry had ever been made, or other act done, to avoid the deed, either by the grantor himself, by any guardian legally appointed during his lifetime, or by any of his heirs or devisees after his death. It was held that there was no evidence from which to infer a ratification of the deed, and that it was ineffectual to pass title.2

insane but not under guardianship, and received by the grantee under circumstances indicating acceptance, is sufficiently delivered and conveys title. Campbell v. Kuhn, 45 Mich. 513.

- ¹ Eaton v. Eaton, 8 Vroom, 108; Tucker v. Moreland, 10 Pet. 64. In Seaver v. Phelps, 11 Pick. 304, Wilde, J., adopts the expression contained in Thompson v. Leach, 3 Mod. 310, "that the grants of infants and of persons non compos are parallel both in law and reason," and says: "It is well settled that the conveyances of a non compos are voidable, and may be avoided by the writ dum fuit non compos mentis or by entry."
- ² Valpey v. Rea, 130 Mass. 304. The question in this case arose on the trial of a writ of entry brought by the judgment creditor, claiming under execution, of one to whom the grantor, before the date of the deed in question, and while sane, had devised the demanded premises.

SECTION IV.

WHO MAY AVOID THE DEED.

- § 406. A voidable contract for the conveyance of lands, entered into by an insane grantor, may be rescinded by the party himself on his restoration to reason, by his executor, administrator, committee, or guardian, these being his personal representatives, or by his heirs as his privies in blood.1 But the right of avoidance does not exist in behalf of strangers, or of persons who are merely the privies in estate of the grantor.2 Thus where one acting in good faith purchased land at a sale under statute foreclosure, and brought an action for possession against a tenant of the premises, not the mortgagor, it was held that evidence offered in behalf of the defendant to show that the mortgagor was of unsound mind when he executed the mortgage was incompetent.⁸ And it is held that a husband having executed a deed conveying the whole of his estate, and being alive, the conveyance will not be set aside on a bill in equity brought by the wife, and charging that the husband was of unsound mind, and incapacitated to contract at the time of its execution, since upon the lunacy of the husband she does not become his legal representative, like an administrator in case of his death.4
- § 407. Upon a bill in equity brought to rescind a contract for land, upon the ground that a party through whom the title had passed was insane when he conveyed the land, and that one claiming an interest in it by inheritance from him had instituted proceedings to set his conveyance aside, it was held that there was no equity in the bill; since, as the deed

Judge of Probate v. Stone, 44 N. H. 593; Key v. Davis, 1 Md. 32; Cates v. Woodson, 2 Dana, 452; Brown v. Freed, 43 Ind. 253; Campbell v. Kuhn, 45 Mich. 513. The committee of an infant lunatic may plead the lunatic's infancy in avoidance of his mortgage made during infancy. Ledger Building Ass'n v. Cook, 34 Leg. Int. (Penn.) 5.

² Breckenridge v. Ormsby, 1 J. J. Marsh. 236, 248; and see cases cited infra. But see Thomas v. Hatch, 3 Sumner, 170. A like rule is applied in cases of infancy. See Hoyle v. Stowe, 2 Dev. & Bat. 323.

³ Ingraham v. Baldwin, 12 Barb. 9; s. c. on appeal, 9 N. Y. 45.

⁴ Kilbee v. Myrick, 12 Fla. 419.

of an insane grantor passes the legal title to the land subject to be defeated, not by any party who may wish it overturned, but by the heirs only, at their election made under circumstances which do not preclude them; so that a purchaser seeking a rescission on the ground that the title is derived through a mesne grantor who was insane must show that the conveyance of such grantor has been set aside at the instance of those who had a right to avoid it, or at least that such proceedings are pending as would in all probability result in setting it aside. But in a case where A., while sane, had devised real estate to B., and afterwards, at a time when it was alleged that A was insane, he had conveyed the same premises to C., it was held that a judgment creditor of B. might, on the trial of a writ of entry brought to obtain possession of the premises as being the property of B. by virtue of the devise, prove that A was insane at the time he executed the deed to C. The court held that, when the will was proved and allowed, B., under his title as devisee, acquired title to, and the right of entry upon, the land, and that this right being under the statutes of Massachusetts subject to be taken upon execution by a creditor, such a creditor would acquire the right to recover the land and to avoid the deed to C. by showing the insanity of C.'s grantor.2

§ 408. Upon a decree setting aside the conveyance of an insane person on the ground of his lunacy, and of fraud or circumvention practised upon him, he or his representatives will ordinarily be entitled to an account of rents and profits for the time during which the defendant had possession. In such a case, where the fact of lunacy was established, but it appeared that the plaintiff was only entitled to a life estate in the property, it was held by the Vice-Chancellor that the plaintiff, or his personal representative after his death, was entitled to an account of the rents and profits during the life of the plaintiff as against the parties in possession under the conveyance.³

¹ Hunt v. Weir, 4 Dana, 347.

² Valpy v. Rea, 130 Mass. 384.

Price v. Berrington, 7 Hare, 394.

SECTION V.

EQUITABLE JURISDICTION TO SET ASIDE DEEDS; WHEN EXERCISED.

- § 409. It rests within the legitimate powers of a court of equity, for good cause shown, to set aside conveyances made by persons of weak or diseased intellects. And since a feigned issue from a court of equity is solely to inform the conscience of the court, it is not necessary to the validity of a decree setting aside such a conveyance that the issue of insanity should first be submitted to a jury. It may be stated as a general rule that such a conveyance will be set aside when it was the result of undue influence, unfair advantage, or fraud on the part of the grantee, where the consideration was manifestly inadequate, or when the grantee was notoriously insane and unable to manage his affairs, and the granter had notice of that fact.
- § 410. It is obvious, since the validity of any civil act will always be determined by the measure of the doer's capacity in respect of such act, that a court of equity will not set aside the conveyance of an insane grantor, if it be shown that the conveyance was not the result or outgrowth of the existing insanity, and that there was a fair consideration for the transaction which the vendor has enjoyed. So where an insane person received the benefit of all the purchase-money accruing from a sale of his lands made by his conservator duly appointed, there being no fraud, and it appearing that
- 1 Smith v. Carll, 5 Johns. Ch. 118. In this case Chancellor Kent applied the rule to set aside a purchase of land made by a lunatic upon a bill being filed for that purpose by his committee. See Clerk v. Clerk, 2 Vern. 412; Addison v. Dawson, id. 678; Clarkson v. Hanway, 2 P. Wms. 202; Bennett v. Vade, 2 Atk. 324; Hall v. Warren, 9 Ves. 605; Huguenin v. Basely, 14 Ves. 273; Bridgeman v. Green, 2 Ves. Sen. 627; Taylor v. Taylor, 8 How. 183; Wampler v. Wolfinger, 13 Md. 337; Highberger v. Stiffler, 21 Md. 352; Todd v. Grove, 33 Md. 194; Eakle v. Reynolds, 54 Md. 305; cases cited infra, and Note following § 278, ante.
 - ² Wright v. Proud, 13 Ves. 136; Cherbonnier v. Evitts, 56 Md. 276.
- ⁸ Carew v. Johnston, 2 Sch. & Lef. 280; Fecel v. Guinault, 32 La. Ann. 91.

at the time of such receipt he had capacity sufficient to transact business intelligently, and that he comprehended what had been done, it was held that he was estopped to deny, afterwards, the validity of such a sale. But in an early case, where one had obtained a conveyance from an insane person long before any commission of lunacy had issued, this was held to be a fraud under the circumstances, and the conveyance was set aside, although the consideration money was near the value of the estate. If the grantor has been found a lunatic from a time previous to his conveyance, his capacity to make the deed in question must be proved affirmatively.

(a.) Grantee must have had Notice of Incapacity.

§ 411. The rule may be considered as settled in England and in most of the United States that courts of equity will not generally interfere to set aside a conveyance on the ground of the insanity of the grantor, when such a conveyance has been made to one purchasing in good faith, for a valuable consideration, and without notice of the insanity.⁴ In a leading English case, in which the heirs of an insane

- ¹ Searle v. Galbraith, 73 Ill. 269.
- ² Evans v. Blood, 3 Bro. Parl. Cas. 632 (1746).
- * See § 194, ante.
- Ashcroft v. De Armond, 44 Iowa, 229; and see Corbit v. Smith, 7 Iowa, 60; Behrens v. McKenzie, 23 Iowa, 333. In 1 Dan. Ch. Pr. *109, it is said that "the interference of the court will depend very much upon the circumstances of each particular case; and where it is impossible to exercise the jurisdiction in favor of the lunatic so as to do justice to the other parties, the court will refuse relief and leave the lunatic to his remedy, if any, at law." And see Shelf. Lun. 418.

In Campbell v. Hill, 22 U. C. C. P. 526, a mortgage given in 1848, by a mortgagor who died in 1855, was impeached on the ground of insanity. It was held, a rational act (the giving of the mortgage) being proved by testimony not impeached to have been done in a rational manner, and a security being given for a valuable consideration, with no suspicion of unfairness, or knowledge by the mortgagees of the insanity, that the transaction could not be upset by evidence of insane delusions, expressions, and conduct, ranging over a number of years, but none of it bearing on the time when the mortgage was made, or in any way approaching the transaction impeached. The doctrine thus laid down was affirmed on appeal. See 23 U. C. C. P. 473.

grantor sought to set aside his conveyance to an innocent purchaser taking through mesne conveyances, and at the same time tendered back the purchase-money, and the defendant pleaded in defence that he was a purchaser for a valuable consideration and without notice of the alleged insanity, the court refused to go into the evidence offered to prove the grantor's insanity, being of opinion that the defendant had established his plea, and that the evidence failed to fix him with notice, either actual or constructive, of the original transaction, or with such notice as, without being direct, might have set a prudent person on inquiry, which, if done, would have disclosed the defects of the original transaction. The Master of the Rolls in giving judgment said: "If an opposite decision were made by me and supported, it would be impossible, I think, hereafter for a purchaser to be safe, if the slightest informality appeared in the transaction through which the title was deduced, though after the lapse of thirty years." 1

¹ Greenslade v. Dare, 20 Beav. 284. The facts in this case were as follows: In 1815 S. S. R. sold the manor and advowson of a rectory to C. in fee for £1,000; in 1818 C. sold the same to C. T. for £1,200; in 1833 C. T. sold the same to J. T.; and in 1849 J. T. sold the same to the defendant for £2,550. In February, 1852, a commission de lunatico inquirendo found S. S. R. of unsound mind from Jan. 1, 1825, and it was alleged that he was insane at the date of the conveyance in 1815. S. S. R. died in April, 1853, and the plaintiffs were his co-heiresses. The plaintiffs, in 1855, sought to set aside the conveyance of S. S. R., alleging his lunacy, and also fraud and undue influence, and inadequate consideration, of which they alleged the defendant had notice. See also Kennedy v. Green, 3 Myl. & K. 699, as explained in Greenslade v. Dare, Price v. Berrington, 3 Mac. & G. 486, 498; opinion of Lord Cranworth in Elliot v. Ince, 7 De G. Mac. & G. 475; Niell v. Morley, 9 Ves. 478, and cases cited ante, §§ 287-294. The case of Sergeson v. Sealey, 2 Atk. 412, has often been cited as authority for the rule stated in the text, but it hardly appears in express words to sustain it. It was held in the case that where, before an inquisition of lunacy, the person found a lunatic had made a purchase, with the approbation of his heir-at-law, the purchase would stand. The inquisition was held in 1726, with a retrospect of eight years, and the purchase was made in 1724. Lord Hardwicke said: "There is not sufficient evidence to satisfy me that he was absolutely a lunatic or non compos. The jury should have found that he was not capable of managing his own affairs, not properly that he was a lunatic." And he allowed weight to the fact that the heir assented to the purchase.

- § 412. In an English case occurring in the Vice-Chancellor's court, upon proceedings brought by the representatives of the mortgagee against the representatives of the deceased mortgagor to foreclose a mortgage given by the mortgagor while insane, it was considered that the decree for foreclosure should be made, although the mortgagee at the time of the original conveyance was to be taken as having notice of the mortgagor's insanity, it appearing that no fraud or undue advantage was taken of the mortgagor, and it not appearing that the mortgagor's insanity affected her understanding of the transaction or her capacity to convey. It was said that the mere insanity of a mortgagor to whom, or to whose agent, the mortgage money had been honestly paid, and of whose insanity no advantage was taken in the transaction, does not annul the rights of the mortgagee. The court in this case seem to have applied to the facts of the transaction a like principle to that stated to obtain in contracts made by an insane person for necessaries, i. e. that such contracts will be supported, if fair and equitable, although the vendor have notice of the vendee's insanity.2
- ¹ Campbell v. Hooper, 3 Sm. & Gif. 153. See sec. vi., post. The facts in this case showed that two years before the mortgage in question was executed the mortgagor had been forcibly taken from her residence and confined in a lunatic asylum at the instance of the defendants; that a commission of lunacy was proceeded with, but that before the date of the execution of the mortgage and before any verdict of the jury had been reached an arrangement was made by which the mortgagor was discharged from custody. Subsequently, and about three years after the execution of the mortgage, a second commission was had, and the jury found that the mortgagor had been insane during a period overreaching the execution of the mortgage. The finding was traversed; but pending the traverse the mortgagor died, and the proceedings to foreclose were instituted after her death. It is to be observed in this case that although, the mortgage having been executed during the time overreached by a finding of lunacy, the mortgagee was held to be affected with notice of the lunacy (see p. 156), yet it would appear that, in fact, he was ignorant of the mortgagor's mental condition when he paid the consideration money and received the mortgage (see p. 159).

² See § 279, ante.

(b.) Grantee must be put in Statu Quo; Contrary Authorities.

§ 413. In conformity with the equitable rule already stated in regard to executed contracts entered into by insane persons for the purchase of personal property, the principle is supported by the weight of authority that a completed contract for the sale of lands made by an insane vendor, without fraud, or notice to the vendee of the grantor's insanity, and for a fair consideration, will not be set aside, either at law or in equity, in favor of the vendor or his representatives, except the purchase-money be restored, and the parties fully reinstated in the condition in which they were prior to the purchase.3 This rule appears to be unquestioned in the English courts. Thus in an early case, where a conveyance of land was set aside in equity on the ground of the grantor's insanity, it was held that the grantee, who had acted in good faith and without notice of the grantor's insanity, should be reimbursed the sum that he had paid for the property.8

§ 414. Although the rule stated appears to be unquestioned in England, and is supported by the leading textwriters, and by the weight of authority in the United States, there are American cases which adopt a different rule. In Massachusetts the matter has been elaborately discussed. In Arnold v. Richmond Iron Works,⁴ which was an action at law for the recovery of land, brought by an insane grantor upon his restoration to reason, it was held that the plaintiff, in order to avoid his deed, must surrender the price, if paid, or the contract for its payment if unpaid. Shaw, C. J., said: "If the unfortunate person of unsound mind, coming to the

¹ See § 287, ante, and cases cited.

² 1 Story Eq. Jur. § 228; 1 Chitty Contr. 191; 1 Dan. Ch. Pr. 85.

Addison v. Dawson, 2 Vern. 678; and see Niell v. Morley, 9 Ves. 478; Price v. Berrington, 3 Mac. & G. 486; Fitzgerald v. Reed, 9 Sm. & M. 94; Yauger v. Skinner, 1 McCart. 389; Eaton v. Eaton, 8 Vroom, 108; Carr v. Holiday, 1 Dev. & Bat. Eq. 344; Same v. Same, 5 Ired. Eq. 167; Riggan v. Green, 80 N. C. 236; Rusk v. Fenton, 14 Bush, 490; Menkins v. Lightener, 18 Ill. 282; Scanlan v. Cobb, 85 Ill. 296; Davis Sewing Machine Co. v. Barnard, 43 Mich. 379.

^{4 1} Gray, 434.

full possession of his mental faculties, desires to relieve himself from a conveyance made during his incapacity, he must restore the price, if paid, or surrender the contract for it if unpaid. In short, he must place the grantor in all respects, as far as possible, in statu quo." 1 But in Gibson v. Soper,2 which was a similar action brought by the guardian of an insane grantor before his restoration to sanity, it was held that the action might be maintained without first restoring the consideration money to the grantee. In the opinion, by Thomas, J., it is said: "To say that an insane man before he can avoid a voidable deed must put the grantee in statu quo would be to say, in effect, that in a large majority of cases his deed shall not be avoided at all." The learned judge endeavors, in an elaborate opinion, to distinguish the case from Arnold v. Richmond Iron Works, on the ground that in the latter case the insane grantor had been restored to reason and had availed himself of the benefits of his contract. He adds, that the rules laid down in the case have "no just application to a case where the grantor has not been restored to sanity, and where no act has been done to affirm the deed, and the grantor has never been in a condition capable of affirming it. Nor do they, considered in their relation to the facts of the case, affirm the doctrine, that, even upon restoration to sanity, restitution of the price is a condition precedent to the avoidance of the deed and the recovery of the estate. If the grantor still has the notes, contract, or deed of land, and elects to retain them, it may be he affirms his grant. This is the extent to which the doctrine can be carried. If the remarks are susceptible of the broader construction contended for, . . . they do not command our assent."

§ 415. Upon an analysis of the two cases it would seem that the opinion by Shaw, C. J., in Arnold v. Richmond Iron Works, was made to rest upon the principle that the plaintiff should not "avail himself of the benefits of his contract," and at the same time rescind his own obligation under it; and that Gibson v. Soper affirms, in effect, a contrary principle, and it follows that the former case is to be considered as in conflict with the latter. It is to be remarked that

¹ See also Allis v. Billings, 6 Met. 415.

² 6 Gray, 279.

the distinction apparently recognized in Gibson v. Soper, between the respective liabilities of the grantor on restoration to sanity, and of his guardian before such restoration, does not appear to rest upon authority, and that it is difficult to perceive why like equities should not be held to exist between the parties, whether the consideration of the conveyance is enjoyed by the insane party himself or by his heirs and representatives, or whether, the grantor remaining insane, the consideration money remains in his guardian's hands for his benefit.¹

§ 416. But the doctrine of Gibson v. Soper is adopted in Maine, where it has been held that if the deed of an insane person, obtained without fraud and for adequate consideration, has never been ratified or affirmed, it may be avoided by his heirs, not only as against his immediate grantee, but also as against subsequent bona fide purchasers for value and with-And the court say that the right of infants and out notice. of the insane to avoid their contracts is an absolute and paramount right, superior to all equities of other persons, and may be exercised against bona fide purchasers from the grantee.2 The courts of Indiana would seem to take a like view of the law.⁸ So in Pennsylvania Gibson, C. J., held that a lunatic's conveyance was absolutely void at law, and that a purchaser from a lunatic had no equity to be reimbursed his purchase-money, or the cost of improvements made on the estate, since no right could spring from a void and prohibited contract.4 In a later case occurring in the same state the same rule was adopted, and made to rest, further, upon the somewhat novel reason that since one of the obvious grounds

¹ In Eaton v. Eaton, 8 Vroom, 108, the court in New Jersey observe that the case of Gibson v. Soper is law in cases where fraud has been practised upon the insane grantor; aliter, when the conveyance was taken in good faith. See also Lord Cottenham's discussion of the cases in Price v. Berrington, 3 Mac. & G. 486. In Davis Sewing Machine Co. v. Barnard, 43 Mich. 379, it was held that a bill to set aside a deed as against a subsequent bond, on the ground that the grantor at the date of the deed was insane and so continued till his death, established no equity greater than that of the grantee.

² Hovey v. Hobson, 53 Maine, 451.

⁸ Somers v. Pumphrey, 24 Ind. 231, 238,

⁴ Rogers v. Walker, 6 Penn. St. 371.

on which the deed of an insane man is held voidable is not merely the incapacity to make a valid sale, but the incapacity prudently to manage and dispose of the proceeds, so, in order to avoid his conveyance, no previous offer of restitution is necessary.¹

§ 417. In New Hampshire, the question of the ultimate right of a purchaser from an insane grantor to recover the purchase-money in some form of action, upon the rescission of the contract, does not appear to have been directly decided; but it has been held that when one makes a deed, which by reason of his mental imbecility conveys no estate, the land descends to his heir, who takes it unconditionally, and is not bound to restore the consideration received by the ancestor, as a condition precedent to taking. Gilchrist, C. J., said: "When a man makes a deed which conveys no estate out of him, his estate descends in the ordinary way. His heir takes it subject to no condition implied from the mere facts that it was conveyed, and a consideration received therefor. might or might not be circumstances which would make the estate of the ancestor liable to repay the consideration received. If there were, it would not follow that it would be necessary for the heir to repay it before he could recover the land. He does not take the land coupled with the condition of repayment."2

SECTION VI.

SPECIFIC PERFORMANCE, WHEN DECREED.

- § 418. Although the executory contracts of insane persons are generally void,⁸ and it is considered that an incomplete
- ¹ Crawford v. Scovell, 94 Penn. St. 48. See Aurentz v. Anderson, 8 Pitts. 310.
- ² Flanders v. Davis, 19 N. H. 139. The court expressed no opinion upon the question whether, the heir having recovered the land by an action at law, it would be open to the grantee or his representatives to recover the purchase-money, in an action at law for money had and received to the plaintiff's use, or in a proceeding in equity.
- * 1 Story Eq. Jur. § 239, and note; 1 Story Contracts, 77, 78; Niell v. Morley, 9 Ves. 478, 482; Sergeson v. Sealey, 2 Atk. 412; Price v. Berrington, 3 Mac. & G. 486; Frost v. Beavan, 17 Jur. 369.

contract of purchase of personal property made by an insane vendee will not be enforced except the contract be for necessaries, yet when an agreement to convey real property, or an interest therein, has been entered into by a party who afterwards becomes insane, a court of equity may compel a specific performance of the contract. Thus the performance of an agreement for the sale of a reversion upon a life estate was decreed against one who after the agreement became a lunatic, and Lord Hardwicke said: "It is certain that the change of the condition of a person entering into an agreement, by becoming a lunatic, will not alter the right of the parties, which will be the same as before, provided they can come at the remedy."² So where a party made a contract for the sale of land, and died before the performance of the contract, leaving an insane child as his only heir-at-law, it was held that a court of equity had power to decree a specific performance of the contract, and to direct the committee of the lunatic to execute all necessary conveyances for the purpose.8 Where one, for a sufficient consideration paid, had covenanted to surrender copyholds, and before the surrender died, leaving an insane heir, it was held that the contract was executed, and that a person might be appointed to convey to the purchaser without suit being brought under the act4 to have the insane heir declared a trustee.⁵

¹ See §§ 293, 294, ante.

² Owen v. Davies, 1 Ves. Sen. 82. See Hall v. Warren, 9 Ves. 605; Yauger v. Skinner, 1 McCart. 389. Now, by the Lunacy Regulation Act, 16 & 17 Vict. c. 70, § 122, it is provided that where a person, having contracted to sell, mortgage, let, divide, exchange, or otherwise dispose of any land, afterwards becomes lunatic, and the contract is not disputed, and is such as the Lord Chancellor thinks ought to be performed, or a specific performance of the contract has been decreed or ordered by the Court of Chancery either before or after the lunacy, the committee of the estate may, under an order of the Chancellor, on the application of the party claiming the benefit of the contract, receive and give an effectual discharge of the money payable to the lunatic, or so much thereof as remains unpaid, and make conveyance of the land to such person and in such manner as the Lord Chancellor may order.

Swartwout v. Burr, 1 Barb. 495.

⁴ Trustee Act, 1850 (13 & 14 Vict. c. 60), §§ 3, 20.

⁵ Cuming, in re, L. R. 5 Ch. App. 72.

- § 419. The courts of equity appear inclined to exercise their jurisdiction to compel the performance of agreements for conveyance, entered into by a party who afterwards becomes insane, in cases where equities to have the contract enforced arise in favor of or against third parties, who are co-contractors with the lunatic. Thus upon a bill for specific performance of an agreement for lease from the plaintiffs to the defendants, where it was objected that one of the defendants had since become incapable of doing any act in consequence of mental incapacity arising from a paralytic stroke, it was ordered that the sane defendant should execute a counterpart of a lease, and also the other defendant, when he should become capable of so doing. So where a lunatic was a member of a partnership by which certain deeds were to be executed, his committee was directed, by an order in lunacy, to concur in the deeds.² Where a party was entitled to certain interests in lands decreed to be sold in order to pay off paramount incumbrances, and after decree he became insane, a conveyance by him to the purchaser under the decree was ordered under the Trustee Act.⁸ An insane lessor has been held liable to renew under the covenants contained in the original lease, made before he became insane.4
- § 420. Where a vendor is found to have been insane from a date *prior* to the contract of purchase, the vendee may file a bill for specific performance, and have an issue framed to determine whether the vendor was actually insane at the date of the contract, or whether the contract was made during a lucid interval, and, if the issue be found in the vendee's favor, he may have a decree for specific performance.⁵ On the other hand, since a court of equity will never compel a pur-

¹ Pegge v. Skynner, 4 Cox Eq. 23.

² Lawrie v. Lees, L. R. 14 Ch. D. 249. In this case the court by its order settled the form and manner in which the deed (a lease) should be drawn and executed; i. e., as between Sir H. M. (the lunatic), by A. B. and C. D. (his committee), and D. C. M. and R. B. (his partners), of the one part, and the proposed lessee of the other part.

Blake v. Blake, 9 Ir. Rep. Eq. 592.

⁴ Doolan, in re, 8 Dru. & War. 442.

Yauger v. Skinner, 1 McCart. 389. See also Frost v. Beavan, 17 Jur. 369; Fry on Specific Performance, 73.

chaser to accept a doubtful title, it is held that when, after a conveyance of real estate, the grantor has been found insane from a time anterior to the conveyance, and the finding has been confirmed by the court, the purchaser may come into court for relief by a bill in the nature of a bill quia timet; or upon his bill for specific performance the vendee may ask in the alternative to have the contract either performed or discharged.1 Thus where a deed was executed February 14, 1854, and in December of the same year a commission of lunacy was issued against the grantor, under which it was found that he had been insane from the February or March then last preceding, the court refused to enforce the performance of the contract upon a bill in equity brought for that purpose by the grantor. The court held that whether or not the grantee agreed to purchase with notice of the lunacy, the title was not such as a court of equity should compel a purchaser to accept; and said that the proposition that the grantee purchased without notice was, from its nature, incapable of proof.2

- ¹ Yauger v. Skinner, 1 McCart. 389.
- ² Francis v. St. Germain, 6 Grant's Ch. (Canada), 636.

CHAPTER XIII.

OF THE CRIMINAL LIABILITY OF INSANE PERSONS.

§ 421. The presumption that all men are sane is applied to criminal as well as to civil cases. This rule is admitted even in those jurisdictions where it is considered that the burden is on the accuser to prove that the accused had mental capacity sufficient to make his act criminal; it being held, until the issue of capacity is raised by the production of affirmative evidence of insanity in behalf of the accused, that the general presumption of sanity will obtain and the accused be held responsible therefor.¹ This general presumption, and the different theories which obtain as to the degree of proof essential upon the issue when insanity is alleged as a defence for unlawful acts, have already been discussed.² It remains to consider the rules which the law applies in determining the quality, as sane or insane, of unlawful acts committed by persons alleged to be insane.

SECTION I.

GENERAL RULES AS TO RESPONSIBILITY.

§ 422. The common law, in former times, construed the term non compos mentis to imply a total deprivation of sense; and as the person non compos mentis was supposed to be incapable of performing valid civil acts, so he was regarded as not responsible, criminally, for unlawful acts done by him. Thus it was held that lunacy in him that killed a man excused

¹ Brotherton v. The People, 75 N. Y. 159; Cunningham v. The State, 56 Miss. 272; People v. Garbutt, 17 Mich. 10; and other cases cited §§ 168, 169, ante.

² See §§ 159–176, ante.

^{*} See § 1, ante.

him; 1 and again, that the killing of a man by a lunatic was no felony, since felony must be done animo felonico,2 or with a wicked will, of which the lunatic, being totally deprived of sense, was supposed incapable. So the courts appear to have considered that the principal test of criminal responsibility was to be found in the degree or violence of the insane affection, and to have regarded very little the question whether the act charged was the outgrowth and direct result of the insanity alleged. Thus Sir Matthew Hale, considering the measure of capacity which will render the party criminally responsible, said: "The best measure that I can think of is this; such a person as laboring under melancholy distempers hath yet ordinarily as great understanding, as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony."8 In the application of these principles to particular cases not only were guilty persons likely to escape punishment, but innocent persons might often be subjected to great hardship, since juries were instructed that, in order to acquit on the ground of insanity, they must, as matter of fact, be satisfied that the accused person was non compos mentis within the legal definition of that term; that is, that he was utterly bereft of sense and reason.

§ 423. This ancient view of the criminal responsibility of insane persons is well illustrated by the charge given to the jury in Arnold's Case (1724). The presiding judge said: "The shooting of my Lord Onslow, which is the fact for which the prisoner is indicted, is proved beyond all manner of contradiction; but whether this shooting was malicious, that depends upon the sanity of the man. That he shot, and that wilfully, is proved; but whether maliciously, that is the thing; whether this man hath the use of his reason and sense? If he was under the visitation of God and could not distinguish between good and evil, and did not know what he did, though he committed the greatest offence, yet he could not be guilty of any offence against any law whatsoever; for guilt arises from the mind, and the wicked will and intention of the man.

¹ Moore v. Hussey, Hobart, 93 (1610).

² Weaver v. Ward, Hobart, 134 (1619).

^{* 1} Hale P. C. 30.

If a man be deprived of his reason, and consequently of his intention, he cannot be guilty; and if that be the case, though he had actually killed my Lord Onslow, he is exempted from punishment: punishment is intended for example and to deter other persons from wicked designs; but the punishment of a madman, a person that hath no design, can have no On the other side we must This is on one side. example, be very cautious; it is not every frantic and idle humor of a man that will exempt him from justice and the punishment Where the man is guilty of a great offence, it of the law. must be very plain and clear before a man is allowed such an exemption; therefore it is not every kind of frantic humor or something unaccountable in a man's actions that points him out to be such a madman as to be exempted from punishment; it must be a man that is totally deprived of his understanding and memory and doth not know what he is doing no more than an infant, than a brute, or a wild beast; such an one is never the object of punishment; therefore I must leave it to your consideration, whether the condition this man was in, as it is represented to you on one side or the other, does show a man who knew what he was doing, and was able to distinguish whether he was doing good or evil and understand what he did; and it is to be observed they admit he was a lunatic and not an idiot. A man that is an idiot, that is born so, never recovers, but a lunatic may and hath his intervals; and they admit that he was a lunatic." 1 But with the growth of more enlightened views in criminal jurisprudence the broader definitions of insanity which have obtained in civil cases were adopted by the criminal courts, and these came to recognize the existence of different degrees of insanity, or of a partial insanity affecting its subject only in respect of particular matters.2

¹ Arnold's Case, 16 State Trials, 695.

The growth of the modern view of criminal responsibility is well shown by a comparison of the charge given the jury in Kinloch's Case, 25 St. Tr. 891 (1795), with that given in Arnold's Case, supra. In Kinloch's Case the court said: "That Sir Francis Kinloch was killed by the hand of the panel is proved beyond a doubt. You have, therefore, to consider the defence on his part set up. Now it will occur to any man of sound sense and judgment that there are different degrees of insanity. If

§ 424. At the present day, the law applies the same rules to the determination of the issue of capacity, whether insanity be alleged to invalidate the civil acts of its subject or to establish his lack of responsibility in a criminal prosecution for unlawful acts committed by him, — the question in either case being whether the party had mental capacity sufficient to enable him to perform the specific act which is the subject of inquiry with intelligent comprehension of its purpose, nature, and consequences.¹ The distinction sometimes made which requires a greater degree of insanity in order to excuse the unlawful acts of the party than would be requisite to exonerate him from the obligation of civil contracts seems to be unsupported by reason and contrary to the tenor of authority.² Thus in a capital case Lord Denman said:

a man is totally and permanently mad, that man cannot be guilty of a crime; he is not amenable to the laws of his country. There is no room for placing the panel in that predicament; for as a person totally and absolutely mad is not an object of punishment, so neither is he of trial. The next insanity that is mentioned in our law books is one that is total, but temporary. When such a man commits a crime, it will be incumbent on him to prove that the deed was committed when he was actually insane. There is still another sort of distemper of mind, a partial insanity, which only relates to particular subjects or notions: such a person will talk and act like a madman upon those matters; but still if he has as much reason as enables him to distinguish between right and wrong, he must suffer that punishment which the law inflicts on the crime he has committed. You have, therefore, to consider the situation of the panel, whether his insanity is of this last kind, or whether he was at the time he committed the crime totally bereaved of reason. For if it is your opinion from the evidence that he was capable of knowing that murder was a crime, in that case you have to find him guilty."

- ¹ See §§ 18, 270, ante. But see contra, 2 Greenl. Ev. § 372, approved in State v. Spencer, 1 Zab. 196.
- The doctrine criticised in the text appears to have been derived from a misconception of certain expressions used arguendo by Mr. Erskine in Hadfield's Case, 27 St. Tr. 1281, 1314. He said: "In civil cases... the law avoids every act of the lunatic during the period of lunacy; although the delusion may be extremely circumscribed; although the mind may be quite sound in all that is not within the shades of the very partial eclipse; and although the act to be avoided can in no way be connected with the influence of the insanity, but to deliver a lunatic from responsibility to criminal justice... the relation between the disease and the act should be apparent." This statement obviously was not

"Something has been said about the power to contract and to make a will. But I think that those things do not supply any test. The question is, whether the prisoner was laboring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing." And in an American case it is held that when insanity is alleged as a defence in a civil action the same rules of law govern the determination of facts as would prevail in a criminal trial involving the same questions.²

§ 425. The law does not undertake to measure the intellectual capacities of men. Thus mere weakness of intellect not such as to render the subject incapable of understanding the nature and effect of his actions is no excuse for unlawful acts done by him.³ Hence, in a criminal prosecution, proof tending to show the inferior mental capacity of the prisoner, not being offered for the purpose of proving him insane, is inadmissible.⁴ So proof of mere eccentricity, singularity of manner, oddity, or hypochondria, existing in the accused, is not proof to establish the plea of insanity.⁵ And the same

intended to define the measure of insanity which would destroy responsibility in any case, civil or criminal; and it misstates the law as to the effect of partial insanity upon the party's civil responsibility. See § 270, ante, et seq. In McTaggart v. Thompson, 14 Penn. St. 149, it was said that less evidence should satisfy a jury of a party's incapacity to make a will than would be required to acquit one charged with a crime or misdemeanor. (See also Commonwealth v. Mosler, 4 Penn. St. 266.) This expression may be explained as being intended to lay down that view of the law which requires the jury, in a criminal case, to be convinced of the prisoner's insanity beyond a reasonable doubt in order to acquit (see § 163, ante), — a view which is to be clearly distinguished from that which would require a greater degree of insanity to support an acquittal in a criminal case than would suffice to invalidate a civil act or contract of the party.

- ¹ Regina v. Oxford, 9 C. & P. 525.
- ² State v. Geddis. 42 Iowa, 264. See also State v. Gardiner, Wright (Ohio), 392.
- Regina v. Higginson, 1 C. & K. 129; Patterson v. People, 46 Barb. 625. See also cases cited under §§ 8, 277, ante.
 - ⁴ Patterson v. People, ubi supra.
- ⁵ Regina v. Vaughan, 1 Cox C. C. 80; Hawe v. The State, 11 Neb. 537.

rule applies to proof offered of mere melancholy or uncontrollable violence of temper existing in the accused.¹ But when mental weakness is so great as to amount to fatuity, and render the party incapable of governing himself, the law considers him as an irresponsible being. And this is so although his disease may not, and generally cannot, be indicated, as in other forms of insanity, by the manifestation of specific delusions, since in cases of complete mental imbecility the party has not sufficient capacity to form even those erroneous mental conceptions called delusions.²

SECTION II.

OF DELUSION AS AFFECTING THE ACT.

(a.) In order to excuse, must affect the Intellect.

§ 426. The rule has already been stated that except in cases of complete fatuity, or such a condition of mental weakness as disqualifies its subject from forming any conception, whether true or false, of the relations of facts and objects, delusion is the test of the existence of insanity.8 This is the rule in criminal as well as in civil cases. And whenever the existence of insane delusion is alleged as an excuse for an unlawful act, it must appear, in order to make the defence available, that the delusion exists in respect of facts and objects and their relations, and does not consist in mere wrong notions, prejudices, or opinions of a moral nature, since the aberration, in order to affect the intellect of the individual, must be mental, not moral merely.4 Thus, in a capital case, the jury were instructed that the question in issue was whether the accused person did the act complained of under a delusion, believing it to be other than it was in its relation to immediate effects and ultimate consequences; and they were told that if the prisoner, when he committed the

¹ Cole's Case, 7 Abb. N. s. 321.

² Regina v. Shaw, L. R. 1 Cr. Cas. 145; s. c. 11 Cox Cr. Cas. 109; Regina v. Bishop, 14 Cox Cr. Cas. 404.

^{*} See § 13, ante.

⁴ Regina v. Burton, 1 F. & F. 772.

homicide charged, knew what he was doing, and that it was likely to cause death, and was contrary to the law of God and man, and that the law directed that persons who committed such acts should be punished, he was guilty of murder.¹

- § 427. So upon the trial of an indictment for murder by shooting, it appeared that the accused at the time of the act was possessed with a delusion that the inhabitants of a certain town, particularly the victim of the act, were continually issuing warrants against him, with the intent of depriving him of his life or liberty. The medical testimony introduced in behalf of the defence was to the effect that the prisoner was at the time of the act suffering from monomania, and might not have been aware that in firing the gun his act involved the crime of murder. Lord Lyndhurst told the jury that, before they should acquit the accused on the ground of his insanity, they should be satisfied that he did not know when he committed the act what the effect of it, if fatal, would be with reference to the crime of murder.²
- § 428. Except in a class of cases hereafter noticed,⁸ in which delusion is relied on merely as being evidence of such general lack of mental power as will render the party irresponsible, or as a symptom or manifestation of general unsoundness, the act done, in order to be excused, must be the

¹ Regina v. Townley, 1 F. & F. 839.

Rex v. Offord, 5 C. & P. 168. In Bellingham's Case, reported 1 Coll. Lun. Addenda, 630, the presiding judge told the jury "that in order to support such a defence [i. e. of insanity], it ought to appear by the most direct and unquestionable evidence that the prisoner was incapable of judging between right and wrong; that, in fact, it must be proved beyond all doubt, that, at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature; and that there was no other proof of insanity that would excuse murder or any other crime. . . . That in the species of insanity in which the patient fancies the existence of injury and seeks the opportunity of gratifying revenge by some hostile act, if such person be capable in other respects of distinguishing right from wrong, there would be no excuse for any act of atrocity which he might commit under this description of derangement" These expressions were approved by Lord Lyndhurst in Rex v. Offord, ubi supra.

^{*} See §§ 431–433, post.

direct outgrowth and consequence of the delusion. In other words, if the defence be partial insanity, it must appear that such insanity caused the act. For if the unlawful act be not the outgrowth of the partial insanity, the law will presume that the accused understood the nature and character of the act and its consequences.1 It is said by Gibson, C. J., that in cases of partial insanity the subject " is a responsible agent, if he were not instigated by his madness to perpetrate the act. He continues to be a legitimate object of punishment, although he may have been laboring under a moral obliquity of perception, as much so as if he were merely laboring under an obliquity of vision. A man whose mind squints, unless impelled to crime by this very moral obliquity, is as much amenable to punishment as one whose eye squints." And he pronounces it "a monstrous error" to hold that "if a man has the least taint of insanity entering into his mental structure, it discharges him of all responsibility to the laws."2

(b.) Must be such as, if a Reality, would excuse the Act.

§ 429. It may be stated as a general rule that where a person accused of crime is shown to have been laboring under partial insanity at the time of the commission of the act charged, he is to be considered as in the same situation, in respect of responsibility, as if the supposed facts in respect of which the delusion exists were real. This rule was laid down by the English judges, after great deliberation, in McNaghten's Case,⁸ its statement being guarded by the qualification that it is applicable only to the case of persons laboring under partial delusions (i. e. under delusions existing only in respect of particular subjects), and not in other respects insane. Thus although the party accused did the act complained of with a view, under the influence of an insane

¹ United States v. Holmes, 1 Cliff. 98; Roberts v. The State, 3 Ga. 310; State v. Huting, 21 Mo. 464; Bovard v. The State, 30 Miss. 600; Dejarnette v. The Commonwealth, 75 Va. 867.

² Commonwealth v. Mosler, 4 Penn. St. 266.

^{* 10} Cl. & Fin. 200. (For a full statement of this case see Note following § 433, post.) See also Boswell v. The State, 63 Ala. 307.

delusion, of redressing or revenging some supposed grievance or of producing some public benefit, he may nevertheless be punishable, according to the nature of the crime committed.¹

§ 430. The rule stated obtains although the delusion is, in respect of its subject, intimately connected with the act done, or with the object of the act. Thus where one was indicted for the murder of his wife, and it appeared that he labored under a fixed delusion that she was unfaithful to him and had practised spells upon him to take his life, the existence of the delusion was held to be no excuse for the act, if the accused remained mentally capable of perceiving its nature and of determining by an effort of the will whether he would commit it.2 The converse of the rule is well stated in the leading case of Commonwealth v. Rogers.8 In that case the character of the mental disease relied on to excuse the defendant's act was partial insanity, consisting of melancholy accompanied by delusion. It was held that the delusion would operate as an excuse for the criminal act, if it appeared that the accused, being under its influence, had a real and firm belief in the existence of some fact, not true in itself, but which, if it were true, would excuse the act; as where the accused should believe that the victim of the act had an immediate design upon his life, and under that belief should commit homicide in supposed self-defence.4

- ¹ Cunningham v. The State, 56 Miss. 272; McNaghten's Case, 10 Cl. & Fin. 200; 2 Greenl. Ev. § 372.
 - ² State v. Windsor, 5 Harr. 512.
 - * 7 Met. 500. See also People v. Montgomery, 13 Abb. Pr. N. s. 207.
- 4 Following the illustration given in the text, Shaw, C. J., said: "A common instance is where he [the accused] fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is done by the command of a superior power, which supersedes all human laws, and the laws of nature." This illustration, without qualification, would seem to be somewhat unfortunate as confusing the rule already stated by the learned Chief Justice, and as, possibly, inconsistent with the established principle that impressions or opinions of a moral nature merely do not amount to insane delusions. See State v. Brandon, 8 Jones, 463. But it might well be that belief in the delusion described should be taken as an indication or symptom of such a general insanity as has overborne the will and reason of the subject. See § 431, post.

(c.) May be a Symptom of General Unsoundness.

§ 431. The law as to the effect of insane delusion upon the quality of the unlawful acts committed by its subject, as stated in McNaghten's Case,1 is to be limited to those cases of partial insanity in which, outside the realm of the delusion, mental sanity exists. But in the case of Commonwealth v. Rogers the rule was first clearly laid down that the existence of specific delusion, not in itself an excuse for the act committed, "may indicate that the mind is in a diseased state; that the known tendency of that diseased state of the mind is to break out in sudden paroxysms of violence, venting itself in homicide or other violent acts, . . . so that . . . the act, connecting itself with the previous symptoms and indications, will enable an experienced person to say that the outbreak was of such a character that for the time being it must have overborne memory and reason; that the act was the result of the disease and not of a mind capable of choosing."2

§ 432. The defendant in this case, a convict in the State Prison at Charlestown, Mass., was indicted for the murder of the warden of the prison by stabbing him with a knife. The sole defence was insanity. The homicide occurred on a Thursday, and the evidence in the case tended to show that, from the Monday night previous up to a time subsequent to the act, the prisoner was laboring under some powerful hallucination; that he was at times in great distress and apprehension; that he declared he heard the voices of his fellow-prisoners confined in distant parts of the prison, and also of the officers, speaking to him and threatening him with danger; telling him that poison was mingled in his food, that a fatal or dangerous game was playing on him which he could not long survive, and that the warden was about to confine him in "the old prison" until he was carried out feet first. On the afternoon of the homicide the prisoner saw the warden entering the shop where he, the prisoner, was at work, and, as it was contended, under the influence of delusion and impelled by the

¹ See Note following § 433.

² 7 Met. 500.

fear of impending danger he rushed upon the warden and committed the act charged. At the trial, Chief Justice Shaw stated the issues for the jury to be as follows: "(1.) Was there such a delusion or hallucination? (i.e. an insane delusion). (2.) Did the accused act under a false but sincere belief that the warden had a design to shut him up, and, under that pretext, destroy his life; and did he take this means to prevent it? (3.) Are the facts of such a character . . . as to induce the jury to believe that the accused had been laboring. for several days under monomania, attended with delusion, and did this indicate such a diseased state of the mind that the act . . . was to be considered as an outbreak or paroxysm of disease, which for the time being overwhelmed and superseded reason and judgment, so that the accused was not an acountable agent?" It is to be observed that the facts in this case showed the existence of insane delusions as to tangible facts, cognate with, but separable from, the specific delusion which prompted the act, and that the rule stated required the specific delusion to be considered in connection with the other symptoms of insanity proved.1

§ 433. The rule thus established in Massachusetts appears to be accepted generally by the courts both of England and the United States. Thus in a capital case, the defence being insanity, the accused was shown to have been the subject of insane delusion in respect of his property, and the jury were instructed that although insanity upon one point would not exempt the defendant from criminal responsibility, yet the existence of the delusion proved was not immaterial as bearing upon the question of his responsibility at another time and upon another subject. It appeared further in the

¹ Mr. Bennett, in his note on this case, 1 B. & H. Lead. Cr. Cas. 101, seems to assume that had the facts of the prisoner's delusion been realities, his act would have been legally excusable. But there was no evidence that Rogers apprehended immediate death at the hands of the warden, and had the court recognized the existence of such an apprehension in the prisoner's mind, a great part of the charge in the case would have been superfluous, since it would have been necessary, under the authority of McNaghten's Case, simply to tell the jury that if the prisoner did the act under an insane apprehension of immediate death, he was entitled to an acquittal.

case that the prisoner committed the act without an apparent motive and under circumstances which he must have known would insure his speedy detection. In another case, Erle, C. J., stated the issue to the jury as follows: "Are you of opinion that the prisoner was in a state to know that what she was doing was wrong? There was morbid action of the brain, there was a state of disease, . . . and other causes which might lead to insanity; and there were, before the act in question, delusions of the senses which the medical men consider . . . symptoms of insanity. She . . . fancied she saw and heard devils. . . . That was a delusion of such a nature as to indicate insanity. Her killing her child at the same time was no doubt under the same influence. It is for you to say whether, upon such evidence, you consider she was in such a state as to know the nature of her actions and to be aware that she was committing a crime. If not, it would be proper to acquit her on the ground of insanity."2

Note. - McNaghten's Case, 10 Cl. & Fin. 200 (1843). As being the most authoritative expression of the modern English law upon the subject of insanity and insane delusion in their relation to acts which if committed by a sane man would be criminal, a fuller report of this case than can conveniently be inserted in the text is here presented. The prisoner was indicted for the murder of Edward Drummond, private secretary of Sir Robert Peel (and whom he mistook for Sir Robert Peel himself), by shooting, and was tried in the Central Criminal Court, Tindal, C. J., presiding. (See 1 C. & K. 130, n.) The Chief Justice instructed the jury that "the question to be determined is, whether, at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of the opinion that the prisoner was not sensible. at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favor; but if, on the contrary, they were of opinion that, when he committed the act, he was in a sound state of mind. then their verdict must be against him." The prisoner was acquitted on the ground of insanity. The verdict having been the subject of discussion in the House of Lords, it was determined to take the opinion of the judges upon the following questions: —

1. "What is the law respecting alleged crimes committed by persons afflicted with insane delusion, in respect of one or more particular subjects or persons; as, for instance, where at the time of the commission of the

¹ Regina v. Layton, 4 Cox C. C. 149.

² Regina v. Law, 2 F. & F. 836.

alleged crime the accused knew that he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?"

- 2. "What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is alleged as a defence?"
- 3. "In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?"
- 4. "If a person under an insane delusion as to facts commits an offence in consequence thereof, is he thereby excused?"
- 5. "Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion as to whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was laboring under any or what delusion at the time?"

The judges answered these questions as follows: —

1. Assuming that the question was confined to those persons who labor under such partial delusions only, and are not in other respects insane, the judges were of opinion that, "notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law;" that is, to the law of the land.

Questions 2 and 3 were answered together, and the judges were of opinion that in every case the jury should be told that "every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity it must be clearly proved that at the time of committing the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions had generally been, whether the accused, at the time of the doing of the act, knew the difference between right and wrong; which mode, though rarely if ever leading to any mistake with the jury," was considered not to be "so accurate, when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged."

The judges further observed that "if the question were to be put as

to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was expected in order to lead to a conviction; whereas the law is administered on the principle that every one must be taken conclusively to know it, without proof that he does not know it. If the accused were conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to submit to the jury the question, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong;" which course was considered correct when "accompanied with such explanations and observations as the circumstances of each particular case may require."

As to question 4, the judges replied that the answer to it must, of course, depend on the nature of the delusion; but assuming, as before, that the party labors under partial delusions only, and is not in other respects insane, they thought that "he must be considered in the same situation in regard to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

In answer to question 5, the judges considered that "the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of these questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as matter of right." It is to be observed that the view of the law expressed in the answer to the 5th question is not generally accepted as correct. See §§ 157, 253, 254, 262, ante, notes and cases cited; and also Regina v. Frances, 4 Cox C. C. 57; Doe v. Bainbrigge, id. 454.

SECTION III.

SPECIFIC RULES APPLIED IN THE TRIAL OF CRIMINAL CASES.

§ 434. In the eudeavor to frame rules for the guidance of juries in the trial of criminal causes where insanity is alleged as a defence, which rules shall be applicable to all cases, and

embody in a practical form the general principles already stated, the courts have met with some difficulty; since it is not desirable, at any time, to state the law to the jury more fully than the exigence of the particular case requires.1 It is obvious that in oriminal as well as in civil cases the question to be decided is whether the act done is the work of a free agent, that is, of one having mental power sufficient to govern himself intelligently in respect of the act.2 And the free agency of the party can be destroyed only by the existence and working within him of some controlling disease which he is powerless to resist.⁸ This disease may consist in mere weakness or fatuity which obliterates the reason, will, and perceptions of the subject, of a single and specific delusion in reference to the act contemplated, or of a perversion and general wreck of the mental powers.4 But the disease which the law recognizes as destroying the free agency of its subject must be a disease of the intellect subverting the will or reason, for the law does not recognize any moral power as sufficient to destroy a man's understanding of the nature and quality of his acts.⁵ "It is the reason of man that makes him accountable for his actions, and the deprivation of reason acquits him of crime."6

- ¹ See remark of Lord Denman in Regina v. Oxford, 9 C. & P. 525.
- 2 Blackburn v. The State, 23 Ohio St. 146; People v. Finley, 38 Mich. 482; Stevens v. The State, 31 Ind. 485. "The test lies in the word 'power.' Had the defendant . . . the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong?" Commonwealth v. Haskell, 2 Brews. 491. In Brown v. The Commonwealth, 78 Penn. St. 122, on the question of the prisoner's insanity, the court charged that "if he had power of mind enough to be conscious of what he was doing at the time, then he was responsible to the law for that act." This was held no error, Agnew, C. J., saying: "The charge has a plain English meaning, referring to the nature of the act. All the judge said referred plainly not to the mere act, but to the real nature and character of the act as a crime."
- * Regina v. Oxford, ubi supra; People v. Divine, Edmonds (N. Y.), 594; MacFarland's Case, 8 Abb. n. s. 57; People v. Coffman, 24 Cal. 230; Wright v. The People, 4 Neb. 407.
 - ⁴ See Dew v. Clark, 1 Add. Ecc. 79.
- State v. Brandon, 8 Jones, 463; Walker v. The People, 26 Hun, 671; Regina v. Burton, 3 F. & F. 772. See §§ 10-12, ante, and cases cited.
 - ⁶ State v. Gardiner, Wright (Ohio), 392.

(a.) Knowledge of Right and Wrong.

§ 435. It is perhaps to be regretted that courts have attempted to frame, for the instruction and guidance of juries in criminal cases, any more definite rules than those laid down in the preceding sections; but it has become customary to refer to the consideration of the jury, as a test of the party's responsibility, the condition of his mind as bearing upon the quality, as right or wrong, of the act charged. In the leading English case upon the subject the judges held the true rule to be "that if the accused was conscious that the act was one which he ought not to do, and if the act was at the same time contrary to law, he is punishable;" and further, that, in order "to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." 1

§ 436. Although the rule as stated in McNaghten's Case requires that the want of knowledge in the accused, in order to excuse his act, must be shown to have been the result of mental disease, as distinguished from mere moral obliquity, several cases occur in which this distinction appears to have been lost sight of or not clearly expressed.² But in a leading

¹ McNaghten's Case, 10 Cl. & Fin. 200. See Note following § 433, ante.

Thus, in an English case, Maule, J., instructed the jury that if they were satisfied that at the time of committing a homicide the accused was so insane as not to know right from wrong, he should be acquitted. Regina v. Higginson, 1 C. & K. 129. So in People v. Hobson, 17 Cal. 424, it was held no error to instruct the jury that the "true test of insanity is whether the accused at the time of the commission of the crime was conscious that he was doing what he ought not to do." And see People v. M'Donnell, 47 Cal. 134; Clark's Case, 1 City Hall Recorder (N. Y.), 176 (1818); United States v. Clark, 2 Cranch C. C. 158 (1818); Shannahan v. Commonwealth, 8 Bush, 463; State v. Richards, 39 Conn. 591. In a case tried at nisi prius in New York, the court charged the jury that "if at the time of the act the person was under a delusion, and did not know right from wrong, or that the act was an offence, or was wrong, he was insane, and was not responsible for the act; but that a person was not

case in New York an instruction to the effect that the jury were to decide whether the accused knew right from wrong, and that if he did he was to be considered sane, was pronounced erroneous, the court holding the true test to be whether, at the time of committing the act, the accused was laboring under such mental disease as not to know the nature and quality of the act he was doing.\(^1\) This test would seem to be sufficiently comprehensive to apply to all cases, and to include all that was intended to be laid down by the English judges in McNaghten's Case.\(^2\) But the test is in all cases to

insane who knew right from wrong, and that the act he was committing was a violation of law, and wrong in itself." In the Court of Appeals Denio, C. J., said: "These positions were laid down in an abstract form. The judge might have said that if the prisoner when he killed the deceased was in such a state of mind as to know that the deed was unlawful and morally wrong he was responsible, and that otherwise he was not. This would, perhaps, have been more precise and discriminating; but as the jury was only concerned with the prisoner's condition when he committed the act which was under investigation, it was impossible that the instruction should have been misunderstood. . . . The general correctness of the position laid down cannot be questioned." Willis v. People, 5 Parker Cr. Ca. 621; on appeal, 32 N. Y. 715. In State v. Haywood, Phillips, 376, on an indictment for murder, the following charge, given in the lower court, was approved: "If the prisoner at the time he committed the homicide was in a state to comprehend his relations to other persons, the nature of the act or its criminal character, or, in other words, if he was conscious of doing wrong at the time he committed the homicide, he is responsible. But if . . . the prisoner was under the visitation of God, and could not distinguish between good and evil, and did not know what he did, he is not guilty of any offence against the law; for guilt arises from the mind and wicked will." See also State v. Thompson, Wright (Ohio), 617 (1831); State v. Redemeier, 8 Mo. App. 1. The rules stated in the above cases appear to be objectionable, as tending to confuse the minds of the jury by leading them to confound that ignorance of right and wrong which arises from obtuseness or perversion of moral perception with that which is the outgrowth and product of mental disease, and which alone is a sufficient excuse for unlawful acts.

- ¹ Freeman v. People, 4 Denio, 9.
- The use of the alternative expression in the last clause of the paragraph cited from McNaghten's Case above would seem to be unfortunate, as countenancing, if taken by itself, the doctrine that mere moral perversion or inability to distinguish the moral quality of unlawful acts may be an excuse for such acts. And this view of the law appears to have been adopted in several cases. See People v. Divine, Edmonds (N. Y.), 594;

be applied to the specific act alleged to be criminal, and it is error to charge the jury that responsibility depends upon the general capacity of the accused, or upon his general knowledge of right and wrong.¹

§ 437. The rule in McNaghten's Case has been accepted generally as correct, and is laid down, with more or less precision, in many cases.² Its soundness as an abstract proposition is beyond question; but the language of the rule, as stated, seems open to misconstruction.³ For, as it has often been construed, the rule appears to have a tendency to mislead juries, as inducing them to accept as the test of criminal responsibility the question whether the accused in fact believed his act to be wrong and criminal, whereas the question is whether he had mental power which ought to have enabled him to choose the right and avoid the wrong.⁴ The law on this subject seems to be more exactly expressed in the leading American case already cited, in which the rule was laid down that a party indicted is not entitled to an acquittal on the ground of insanity, if, at the time of the alleged offence, he

People v. Kleim, id. 13; People v. Coffman, 24 Cal. 230. But it would seem to be obvious that a want of knowledge of the nature and quality of an act is equivalent to want of knowledge that it is wrong; and, considering the context of the opinion in McNaghten's Case, it is equally obvious that the judges did not intend to make mere moral obliquity an excuse for unlawful acts, since the rule that the existence of delusion will not excuse the act, unless it would have been excusable had the facts of the delusion been real, cannot be supported if mere moral insanity is to be admitted as an excuse for the act.

- ¹ Looney v. The State, 10 Tex. App. 520; Erwin v. The State, id. 700; § 18, ante.
- ² People v. Montgomery, 13 Abb. Pr. N. s. 207; State v. Spencer, 1 Zab. 196; State v. Windsor, 5 Harr. 512; State v. Brown, 1 Houst. Cr. Cas. 539; Roberts v. State, 3 Ga. 310; Anderson v. State, 42 Ga. 9; Stewart v. State, 58 Ga. 577; Brinkley v. State, id. 296; Cunningham v. The State, 56 Miss. 272; State v. Kotovsky, 74 Mo. 247; Carter v. State, 12 Tex. 500; Thomas v. State, 40 Tex. 60; Webb v. State, 5 Tex. App. 596; Williams v. State, 7 Tex. 163; Clark v. State, 8 Tex. 350; Regina v. Vaughan, 1 Cox C. C. 80; United States v. Shults, 6 McLean, 121; United States v. Guiteau (1882), see Official Report by Alexander & Easton, 2336.
 - * See note to preceding section.
 - 4 See MacFarland's Case, 8 Abb. Pr. N. s. 57.

had capacity and reason sufficient to enable him to distinguish between right and wrong, and understood the nature, character, and consequences of his act, and had mental power sufficient to apply that knowledge to his own act. So in New York it is said that where insanity is interposed as a defence for a criminal act the test of responsibility is the capacity of the party to distinguish between right and wrong at the time, and with respect of the act complained of; and in Ohio the accused in a criminal case is not entitled to an acquittal on the ground of insanity, if he had capacity and reason left sufficient to enable him to distinguish between right and wrong, and understand the nature of his act and his relation to the party injured."

(b.) Moral Perversion no Excuse.

§ 438. It follows as a result of the principles stated that the law does not concern itself with the opinions or beliefs of the persons upon the quality of whose acts it passes judgment, and that the knowledge of right and wrong in reference to any act done, which the law prescribes as essential in order to charge the doer with responsibility for such acts, does not, necessarily, include the right perception of its moral or ethical quality. In other words, to charge the party with responsibility, it is sufficient to show that he understood his act to be malum prohibitum, and the law does not inquire whether he regarded it as malum in se. If the party had, at the time of the commission of the act, such degree of reason and understanding as was sufficient to enable him to understand that his act was forbidden by law, and that the law directed that persons who did such acts should be punished, he is respon-

¹ Commonwealth v. Rogers, 7 Met. 500. And see State v. Huting, 21 Mo. 464; State v. Erb, 74 Mo. 199; Holsenbake v. The State, 45 Ga. 43; Humphreys v. The State, id. 190; Choice v. The State, 31 Ga. 424; Spann v. The State, 47 Ga. 553; Stevens v. The State, 31 Ind. 485; Bradley v. The State, id. 492; Bovard v. The State, 30 Miss. 600.

² Flanagan v. The People, 52 N. Y. 467. See also People v. Pine, 2 Barb. 566; People v. O'Connell, 62 How. Pr. 436; People v. Coleman, 13 Rep. 117.

Loeffner v. The State, 10 Ohio St. 598.

sible; 1 for he must, in contemplation of law, be taken to have anticipated punishment as among the natural and probable consequences of his act.2

(c.) Irresistible Impulse. — Frenzy.

§ 439. The rule stated in McNaghten's Case, although followed in principle in Commonwealth v. Rogers, was stated in the latter case with a qualification which was not recognized, or at least not stated, by the English judges in their answers to the questions of the House of Lords. In Commonwealth v. Rogers it was made a condition to the application of the rule that the party should have mental power sufficient to apply his knowledge of right and wrong to his own case. And the possibility was recognized that there may be such an absence of controlling mental power that the will of the party, as distinguished from his reason, may be obliterated, in which case the party may be said to act from an uncontrollable impulse, his act being "but the involuntary act of the body without the concurrence of a mind directing it." 8 The English courts have been reluctant to recognize the existence of a mental disease controlling the will but not perverting the reason of its subject; 4 but it would seem that to

Regina v. Townley, 3 F. & F. 839; McNaghten's Case, 10 Cl. & Fin. 200. See also United States v. Holmes, 1 Cliff. 98; State v. Spencer, 1 Zab. 196; Commonwealth v. Mosler, 4 Penn. St. 266; Dejarnette v. The Commonwealth, 75 Va. 867.

² Regina v. Oxford, 9 C. & P. 525.

^{*} Commonwealth v. Rogers, 7 Met. 500. In the cases of Stevens v. The State, 31 Ind. 485, Bradley v. The State, id. 492, and Fouts v. The State, 4 Greene (Iowa), 500, the opinion in Commonwealth v. Rogers is regarded as recognizing the fact that insanity may destroy either the understanding or the will of its subject, or both, and this seems, unquestionably, to be the inference drawn from the language of Chief Justice Shaw. In Roberts v. The State, 3 Ga. 310, the court, after stating the general rule, that the existence of reason implies the existence of responsibility, said that an exception exists when one has such reason, yet, in consequence of some delusion, the will is overmastered and there is no criminal intent, provided the act itself is connected with the peculiar delusion under which the prisoner is laboring.

⁴ Regina v. Burton, 8 F. & F. 772.

deny the possible existence of such an affection is to go beyond the province of the law, which deals with the qualities and relations of facts proved, but cannot properly deny the existence, in advance, of any fact, however improbable, which it is proposed to prove. And although nothing would seem more improbable than the growth and subsidence in a brief period of time of an insane affection which, while leaving the reason of its subject unimpaired, should so control his will as to render him irresponsible for acts committed during the period of its duration, yet such an occurrence would not seem to be included in the class of patent impossibilities of the existence of which the law will not admit proof.¹

§ 440. It is to be observed that every act done by an insane person which is the direct outgrowth of his disease is the result in a certain sense of an uncontrollable impulse, since it is not the act of a free agent. This view has been expressed in a number of American cases. Thus it was held that if an insane affection was the efficient cause of the prisoner's act, and that if otherwise he would not have done the act, he should be acquitted; but that in order to an acquittal it must appear that the insanity was of such a degree as to create an uncontrollable impulse, by overriding the reason and judgment and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them.2 So in Pennsylvania it was held that "insanity as a defence must be so great as to have controlled the will and taken away the freedom of moral action;"8 and the court cite with approval the expression of Gibson, C. J., that "it [insanity] must amount to a delusion or hallucination controlling [the] will; making the commission of the act . . . a duty of overruling necessity." 4

¹ The illustration in the text is purposely made extreme, but it is to be noted that the facts in Commonwealth v. Rogers (see § 432) did not admit the theory that the accused acted under a momentary access of mental disease.

² Hopps v. The People, 31 Ill. 385.

^{*} Ortwein v. The Commonwealth, 76 Penn. St. 414. See, to the same effect, Wright v. The People, 4 Neb. 407; Dejarnette v. The Commonwealth, 75 Va. 867.

⁴ Commonwealth v. Mosler, 4 Penn. St. 266.

- § 441. But since the law does not recognize the existence as an excuse for crime of what is called moral insanity, or a perversion of the moral sentiments and perceptions coexisting with the sanity of the intellectual powers, it follows that a passionate impulse to crime arising merely from moral perversion, and not accompanied by insane delusion, can never excuse the criminal act; for the excuse of an irresistible impulse coexisting with the full possession of reasoning powers might be urged in justification of every crime known to the law, for every man might be said, and truly, not to commit any crime except under the influence of some irresistible impulse. So although persons, by long indulgence of bad passions, may make themselves subject to homicidal impulses which, at last, become in a certain sense irresistible, yet the existence of such impulses is far from being a ground of excuse or defence for crime, since these are themselves merely the result and proof of long-continued depravity.2 And in those cases where it appears that the mind of the accused was weakened and clouded at the time of committing the act charged, but was not incapable of remembering, reasoning, and judging in respect to it, it is held that to admit that the prisoner was impelled to the commission of the act by uncontrollable impulse would be to disregard those tests of insanity which the law has established.8
- § 442. An impulse or frenzy arising from a mere excess of unbridled passion will not excuse the resulting criminal act, unless it clearly appear to be the frenzy of madness or mental alienation; in other words, in order to serve as an
 - ¹ Regina v. Barton, 3 Cox C. C. 275.
- Regina v. Brough, tried in 1854, before Erle, C. J., and reported in note to Regina v. Law, 2 F. & F. 836.
 - * United States v. Holmes, 1 Cliff. 98.
- 4 Cole's Case, 7 Abb. Pr. N. s. 321; Pienovi's Case, 3 City Hall Recorder, 123. In the latter case it appeared that the defendant had, in a fit of jealousy, bitten off the nose of his wife. It appeared at the trial that his conduct immediately before and after the commission of the act was that of one bereft of his senses; but the court instructed the jury that if it appeared that during the commission of the offence he acted designedly, and at a subsequent period had a distinct recollection of the atrocious act which he endeavored to justify, the act was rather to be imputed to the visitation of wicked passions than that of God.

excuse for crime, the impulse which urges its subject to the commission of the act must clearly appear to have arisen from And it is held that although one sane in mental disease.1 his normal condition lose, for the moment, his reason, through excess of passion, yet he is responsible for acts committed while his reason is thus in abeyance.2 The rule thus stated would seem to rest upon considerations similar to those which are applied in cases of crimes committed by persons wilfully intoxicated,8 it being the duty of persons of sound mind to exercise self-control sufficient to resist such access of violent passion as may impel its subject to unlawful acts.4 Where it appeared that on the trial of the plaintiff in error for the crime of abduction, the defence being insanity, his counsel had requested the court to charge that the true test of criminal responsibility, where the defence of insanity is interposed to an indictment, is whether or not accused had sufficient reason to know right from wrong, and whether or not he had sufficient power of control to govern his actions, the court below charged the first part of the request, but declined to charge the latter part. This was held no error, on the ground that, if the accused had sufficient reason and intelligence to know right from wrong, it was a matter of no moment whatever

¹ State v. Johnson, 40 Conn. 136; Stevens v. The State, 31 Ind. 485; Cunningham v. The State, 56 Miss. 372.

² State v. Felter, 32 Iowa, 49. In this case the court approved an instruction given to the jury in the court below, that if the accused "was in the possession of a . . . sound mind, and from some real or fancied injury she allowed her passion to escape control, then, though passion and revenge may for the time have driven reason from its seat and usurped it, and urged the defendant, with a force at the moment irresistible, to desperate acts, she cannot claim for those acts the protection of insanity." See, to the same effect, State v. Geddis, 42 Iowa, 264.

^{*} See § 447, post. And as the weight of modern authority is in favor of the rule that although intoxication is of itself no excuse for crime, yet its existence may affect the degree of the crime (see § 450, post), so in a case of homicide it has been held that the defendant's overwhelming conviction of domestic dishonor, although not such as to have deprived the prisoner of reason and the power of discriminating between right and wrong, may, nevertheless, be such as to have deprived his act of that premeditation necessary for malice. Cole's Case, 7 Abb. Pr. N. s. 321.

⁴ Regina v. Haynes, 1 F. & F. 666.

whether or not he had sufficient power to control or govern his actions.¹ But the statement in this case apparently wants some qualification.

§ 443. So the absence of any apparent motive for the act committed will not warrant the inference that the act was the result of such an irresistible impulse as should excuse the perpetrator.2 In a capital case occurring at nisi prius, Bramwell, B., said: "It has been urged for the prisoner that you should acquit him on the ground that, it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence, or homicidal tendency. . . . The circumstance of an act being apparently motiveless is not a ground from which you can safely infer the existence of such influence. . . . But if an influence be so powerful as to be irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. . . . But if the influence itself be held a legal excuse, . . . you at once withdraw a most powerful restraint, — that forbidding and punishing its perpetration. We must therefore return to the simple question you have to determine, — did the prisoner, know the nature of the act he was doing; and did he know he was doing what was wrong."8

§ 444. But where it appears that the reason and judgment of the accused person were destroyed at the time of the act, and therefore that the impulse urging him to its commission was an insane impulse, the act is to be excused as that of an irresponsible being. In such cases the existence of the impulse is to be taken rather as a symptom or result of such mental disease as will excuse the unlawful acts of its subject, rather than as, of itself, furnishing the excuse for such acts. Thus where one was indicted for the murder of a person whom he had found in the act of criminal intercourse with his (the defendant's) sister, the court was asked to instruct the jury

¹ Walker v. People, 26 Hun, 67.

² See § 230, ante.

^{*} Regina v. Haynes, 1 F. & F. 666; and see State v. Spencer, 1 Zab. 196, and note to § 230, ante.

⁴ See § 431, ante.

that if the defendant, under such circumstances, was so excited as to overwhelm his reason, conscience, and judgment, and cause him to act from an uncontrollable and irresistible impulse, the law would not hold him responsible for the act. Upon this request the court said: "As this point seems to amount to the proposition that if the prisoner was temporarily insane at the time, he is not guilty, it is affirmed as an abstract proposition . . . from whatever cause the insanity arose. But the jury must not confound anger or wrath with actual insanity, because however absurdly or unreasonably a man may act when exceedingly angry, if his reason is not actually dethroned it is no legal excuse for the violation of law." 1 So where a person was indicted for robbing a female of her shoe in the daytime, and in the public street of a city, and it appeared that the accused had been for several years, and ever since an injury to his head which it was supposed had affected his brain, in the habit of taking the shoes of females, wherever he could find them, and secreting them without any apparent object for so doing, and that insanity was a hereditary disease in the family of the prisoner on the side of his mother, , with other circumstances tending to establish monomania, it was held that the act might have been committed under an insane impulse, and the prisoner was acquitted on the ground of insanity.2

§ 445. The case of Commonwealth v. Rogers, already referred to, has been cited as supporting the unqualified proposition that one who commits an unlawful act while laboring under any delusion which overpowers his will and deprives him of self-control is to be excused. But the case does not appear to establish so broad a proposition. In the outset, Shaw, C. J., adopted the rule, as commonly stated, that if the accused "understands the nature and character of his act, and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that, if he does the act, he

¹ Lynch v. The Commonwealth, 77 Penn. St. 205.

² People v. Sprague, 2 Parker Cr. Cas. 43.

^{* 7} Met. 500.

⁴ See Bennett & Heard, 1 Lead. Cr. Cas. 89, 108.

will do wrong, and receive punishment," partial insanity will not exempt him from responsibility. He continued: "If it is proved to the satisfaction of the jury that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree that for the time being it overwhelmed the reason, conscience, and judgment, and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse." And in stating, finally, the issue to the jury he simply defined the question to be whether there appeared "such a diseased state of mind that the act of killing the warden was to be considered as an outbreak or paroxysm of disease, which for the time being overwhelmed and superseded reason and judgment, so that the accused was not an accountable agent." The case does not appear to approve that view of the law which would consider that an impulse arising out of excess of passion or mere moral depravity should serve as an excuse for the commission of unlawful acts. On the contrary, it approves the rule stated that the act, in order to be excused, must be the result of mental disease, manifesting itself in a specific direction. And it is to be observed that the facts of the case 1 did not call for an opinion as to the possible existence of a legal insanity having its beginning, duration, and end, possibly, in a single moment of passion and impulse.2

SECTION IV.

DRUNKENNESS.

(a.) Voluntary, will not destroy Responsibility.

§ 446. Since the term "insanity," as used in the law, embraces every species of mental unsoundness, however arising, it must be taken to include that condition of subverted rea-

¹ See § 431, ante. The evidence clearly showed the existence in the accused, for several days prior to the homicide, of those distinct delusions of the senses which the law regards as the best evidence of the existence of insanity.

² See § 439, ante.

son which may be produced by intoxication. This condition falls within that class of cases, recognized by the early authorities, where insanity is caused by the subject's wilful act,1 and thus has been called a voluntary madness.2 Although some authorities declare that drunkenness is not insanity,8 it would seem that these expressions are to be taken as meaning that it is not that species of insanity which the law recognizes as being a sufficient excuse for unlawful acts committed under its influence; for it is an established rule of law, embodied in a long series of decisions, that a temporary suspension of reason, occasioned by the voluntary intoxication of a party ordinarily sane and responsible, will not relieve him from criminal responsibility for his acts committed during such suspension of reason.4 Nor, it is said, does the law consider the question whether the degree of drunkenness is slight or excessive, even although the party, at the time of the commission of the offence, was intoxicated to such a degree as to be unconscious of what he was doing.6 So it is

¹ See § 1, ante, and note.

² State v. Turner, Wright (Ohio), 20; State v. Thompson, id. 617. And see State v. Hundley, 46 Mo. 414; State v. Thompson, 12 Nev. 140.

⁸ Rennie's Case, 1 Lew. Cr. Cas. 76; People v. O'Connell, 62 How. Pr. 436; Carter v. The State, 12 Tex. 500.

⁴ Dammaree's Case, 15 St. Tr. 522; Frost's Case, 22 St. Tr. 472; State v. Toohey, 2 Rice Dig. (So. Car.) 105; People v. Rogers, 18 N. Y. 9; State v. Thompson, Wright (Ohio), 617; State v. Turner, id. 20; Bennett v. The State, 1 M. & Yerg. 133; Swan v. The State, 4 Humph. 136; Commonwealth v. Hawkins, 3 Gray, 463; Commonwealth v. Malone, 114 Mass. 295; State v. John, 8 Ired. (Law), 330; State v. Hundley, 46 Mo. 414; Cluck v. The State, 40 Ind. 264; State v. Thompson, 12 Nev. 140; and cases cited under following sections. See 4 Bl. Com. *25; 1 Hale P. C. 32; 1 Hawk. P. C. ch. 1, § 6. Acts of barratry are not justified or excused by the fact that they were committed during voluntary intoxication; aliter, if done in a state of actual insanity, caused by a long course of intemperance or by a sudden interruption of a habit of excessive drinking. Lawton v. The Sun Mutual Ins. Co., 2 Cush. 500.

⁵ People v. O'Connell, 62 How. Pr. 436.

⁶ People v. Robinson, 1 Parker Cr. Rep. 649; Rex v. Carroll, 7 C. & P. 145. Although the rule stated appears to be supported by the tenor of the dicta contained in the text-books and reported cases, it may be doubted whether the courts would not hesitate to apply it, in its full severity, to the conviction of a person who should appear clearly to have been, at the

no excuse for an offence committed by an intoxicated person that, either by reason of injuries received, or disease, or constitutional infirmity, he is more susceptible than another to the influence of intoxicating liquors, if, when sober, he is possessed of legal discretion, of which he voluntarily deprives himself by drinking. So an inordinate thirst for liquor, produced and fostered by the habit of drinking, is no excuse for the consequences resulting from the indulgence of such an appetite.¹

§ 447. The rules of law upon this subject rest upon the reasonable considerations (1) that a man who voluntarily puts himself in a condition to have no control of his actions must be held to intend the consequences; and (2) that where a man has voluntarily put himself in such a condition, and has mind enough to conceive and perpetrate a criminal act, he must be considered as having mind enough to subject him to legal responsibility. Moreover, the law, it is said, applies to such cases the rule which allows malice to be inferred from the nature of the instrument used in committing the crime, the absence of provocation for its commission, and the other circumstances surrounding the act, although proof of express malice be wanting. The courts have sometimes instructed juries that the existence of drunkenness in the

time of the commission of the act, incapable, by reason of intoxication, of acting from motive. In People v. Rogers, 18 N. Y. 9, Denio, J., said: "So long as the offender is capable of conceiving a design, he will be presumed, in the absence of proof to the contrary, to have intended the natural consequences of his own act. Thus, if a man, without provocation, shoot down another or cleave him down with an axe, no degree of intoxication, short of that which shows that he was at the time utterly incapable of acting from motive, will shield him from conviction." These expressions were approved in the case of Cluck v. The State, 40 Ind. 264; and see Kenney v. The People, 31 N. Y. 330. As to the effect of intoxication in palliating crimes in which the element of sane intent is an essential ingredient, see §§ 450, 452, post.

- ¹ Choice v. The State, 31 Ga. 424; Humphreys v. The State, 45 Ga. 190.
- ² People v. Garbutt, 17 Mich. 9; Commonwealth v. Hawkins, 5 Gray, 463.
 - * People v. Robinson, 2 Parker Cr. 235.
 - 4 Boswell v. The Commonwealth, 20 Gratt. 860. See § 450, post.

criminal rather tends to aggravate than to excuse his unlawful act; 1 but it is apprehended that this is the expression of an ethical rather than of a legal truth.

(b.) Mental Disease arising from, may Excuse.

- § 448. Although voluntary drunkenness is no excuse for unlawful acts committed while the subject remains under its direct influence, yet if the habit of drunkenness result in such a form of chronic mental disease as would, if it were induced by other causes, serve as an excuse for the act, the existence of such a disease will relieve its subject from responsibility.² And if a person so insane as to be criminally irresponsible, although his insanity be induced by habitual drunkenness, become intoxicated, and while in that condition commits an offence, he is not responsible, since, it seems, that being insane he cannot be considered as having become intoxicated voluntarily.8 But the insanity resulting from drunken habits, in order to destroy criminal responsibility, must be fixed and habitual; not the mere temporary depression or aberration of mind sometimes accompanying or following intoxication. In other words, it must be a remote rather than an immediate consequence, the result of a fixed habit rather than of a single occurrence of vicious indulgence.4
- § 449. The most common form of mental disorder resulting from habits of intoxication is delirium tremens, or mania a potu, which in law is considered to be a form of insanity,⁵
- ¹ Dammaree's Case, 15 St. Tr. 522; Frost's Case, 22 St. Tr. 472; State v. Thompson, Wright (Ohio), 617; United States v. Forbes, Crabbe, 558; and see 4 Bl. Com. *26; 1 Coke, 247.
- ² Rennie's Case, 1 Lew. Cr. Cas. 76; Burrows's Case, id. 75; People v. Rogers, 18 N. Y. 9; Bradley v. The State, 31 Ind. 492; Fisher v. The State, 64 Ind. 435; Cluck v. The State, 40 Ind. 264; Boswell v. The Commonwealth, 20 Gratt. 860; United States v. Holmes, Crabbe, 558.
 - Bailey v. The State, 26 Ind. 422.
- ⁴ See cases cited supra; and also United States v. Drew, 5 Mason, 28; United States v. McGlue, 1 Curtis C. C. 1; Cornwell v. The State, 1 M. & Yerg. 147.
- ⁶ Macconehey v. The State, 5 Ohio St. 77; Carter v. The State, 12 Tex. 500; Erwin v. The State, 10 Tex. App. 700. In the latter case it was held to be the duty of the court to charge specifically as to the legal

and may excuse criminal acts committed under its influence, since the frenzy induced by it is not the immediate but the remote consequence of indulgence, and is not to be traced to any one single act of intoxication. And the rule stated applies without regard to the duration, in point of time, of the fit of delirium. It is also said: "The reason that intoxication creates no exemption from criminal responsibility does not apply to delirium tremens, which, although like many other kinds of mania the result of prior vicious indulgence, is always shunned rather than courted by the patient, and is not voluntarily assumed either as a cloak for guilt, or to nerve the perpetrator to the commission of crime." But the considerations stated would seem to furnish a moral justification of the rule rather than a legal reason for its existence.

(c.) May be a Palliation of Crime.

§ 450. Although drunkenness, to whatever degree existing, is never an excuse for, it may in certain cases be a palliation of, crimes committed under its influence, for it is a rule supported by the weight of modern authority that in cases where the law recognizes the existence of degrees of the same crime, and provides that wilful and deliberate intention, malice, and premeditation shall be proved in order to convict the accused of the first or most guilty degree of the crime, evidence that the accused was intoxicated at the time of committing the act charged is competent to be considered upon the question whether he was in such a condition of mind as to be capable of deliberate premeditation. This rule was laid down, in a recent case of homicide, by the Supreme Court of the United States, having previously been adopted by

effect on the case of the existence of delirium tremens when alleged as a defence, however slight the evidence might be to support it. See § 158, ante, and cases cited.

¹ People v. Robinson, 2 Parker Cr. 235; People v. O'Connell, 62 How. Pr. 436; O'Brien v. The People, 48 Barb. 274; United States v. McGlue, 1 Curtis C. C. 1; Macconehey v. The State, 5 Ohio St. 77.

² Regina v. Davis, 14 Cox Cr. Cas. 563.

^{*} Macconehey v. The State, ubi supra.

⁴ Hopt v. People, 104 U. S. 631, opinion by Gray, J. This case arose

many of the state courts.¹ And it appears to be sustained by the weight of English authority.²

§ 451. The rule as stated has not, however, been accepted by the courts of several states. In Massachusetts, on the trial of a capital case, the accused asked the court to instruct the jury that if upon the evidence they were satisfied "that there was mutual combat, or other provocation sufficient to reduce the homicide from murder to manslaughter, provided the fatal blow was struck in the heat of blood and paroxysm of anger thereby produced, so that they were called on to inquire whether, between the provocation and the crime, the defendant

upon error to the Supreme Court of Utah, the Penal Code of which territory provides (sect. 20) that "no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." The opinion in the case, however, is not made to rest upon the interpretation of this statute merely, but it applies to all cases in which the law recognizes the existence of degrees of the crime charged.

- Penn v. M'Fall, Addison, 255; Keenan v. Commonwealth, 44 Penn. St. 55; Jones v. Commonwealth, 75 Penn. St. 403; State v. Johnson, 40 Conn. 136; Pirtle v. The State, 9 Humph. 663; Haile v. The State, 11 Humph. 154; Smith v. The Commonwealth, 1 Duvall, 224; Blimm v. The Commonwealth, 7 Bush, 320 (but see Shannahan v. The Commonwealth, 8 Bush, 463, where the doctrine of the former Kentucky cases appears to be somewhat modified); Boswell v. The Commonwealth, 20 Gratt 860; Willis v. The Commonwealth, 32 Gratt. 929; People v. Belencia, 21 Cal. 544; People v. King, 27 Cal. 507; People v. Lewis, 36 Cal. 531; People v. Williams, 43 Cal. 344; Farrell v. The State, 43 Tex. 508; Colbath v. The State, 2 Tex. App. 391; State v. White, 14 Kan. 538; Schlencker v. State, 9 Neb. 241; People v. Odell, 1 Dak. 197; and see cases cited under § 452, post.
- Rex v. Grindley, cited 1 Russ. on Crimes, 8; Rex v. Meakin, 7 C. & P. 297; Rex v. Thomas, id. 817; Regina v. Cruse, 8 C. & P. 541; and see Marshall's Case, 1 Lew. Cr. Cas. 76. In Rex v. Carroll, 7 C. & P. 145, it was said that the rule laid down in Rex v. Grindley, to the effect that intoxication at the time of a homicide might properly be taken into consideration in determining whether the act was premeditated or done with sudden heat and impulse, was not law. But the doctrine of the case thus criticised was approved in Rex v. Meakin and Rex v. Thomas, ubi supra.

had reasonable time to cool, or did actually cool, it was proper for them to consider how far the defendant's intoxication had or might have had any effect in prolonging that spasm of anger." Numerous authorities were cited in support of the defendant's prayer. But Shaw, C. J., instructed the jury thus: "The rule of law is, that although the use of intoxicating liquors does to some extent blind the reason and exasperate the passions, yet, as a man voluntarily brings it upon himself, he cannot use it as an excuse, or justification, or extenuation of crime. A man, because he is intoxicated, is not deprived of any legal advantage or protection; but he cannot avail himself of his intoxication to exempt him from any legal responsibility, which would attach to him if sober." So in Missouri it has been held that drunkenness cannot be taken into consideration by a jury in determining whether one committing a homicide acted thereon wilfully, deliberately, and premeditatedly, so as to make the crime murder in the first degree.2

¹ Commonwealth v. Hawkins, 5 Gray, 463 (1855). In Commonwealth v. Malone, 114 Mass. 295, the court approved the rule as stated by Shaw, C. J., in Commonwealth v. Hawkins, and said that there was no ground for contending that the case under consideration came within any exception to the rule. But it is to be observed that the question in Commonwealth v. Malone arose upon an indictment for assault and battery, and so was one of the class of cases in which the authorities are agreed that intoxication can be neither an excuse nor an extenuation (see § 454, post), since the law recognizes no degrees in the crime of assault and battery, and the commission of the act of assault conclusively determines the intent of the party committing it. In Hopt v. The People, 104 U. S. 631, 634, Gray, J., says the rule that "the question whether the accused is in such a condition of mind, by reason of drunkenness, or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury," under a statute establishing different degrees of murder, has been held repeatedly "in the Supreme Judicial Court of Massachusetts in cases tried before a full court, one of which is reported upon other points (Commonwealth v. Dorsey, 103 Mass. 412)."

State v. Cross, 27 Mo. 332 (1858), Richardson, J., dissenting. In this case the court commented severely upon the contrary rule as laid down in Pirtle v. The State, 9 Humph. 663 (see § 450, ante), and cited in support of its own position Rex v. Carroll, 7 C. & P. 145; which latter case, however, does not state correctly the English law on this subject. (See § 450, ante, note.)

In New York, in a capital case tried in the Court of Oyer and Terminer, the jury were instructed that although intoxication would not excuse crime, yet the jury might take into consideration the fact of intoxication, so far as it would aid them in determining the intent with which the homicide was committed. But in a subsequent case, which was carried to the Court of Appeals, it was held that the voluntary intoxication of one who, without provocation, commits a homicide, although amounting to frenzy, does not exempt him from the same construction of his conduct, and the same legal inferences upon the question of intent as affecting the grade of his crime, which are applicable to a person entirely sober.2 This rule was approved in a later case, and a refusal of the court below to instruct the jury that they might consider the fact of drunkenness as affecting the question of premeditation was held no error. But as to whether intoxication might properly be taken into consideration as affecting the question of deliberation the court were in doubt.8

§ 452. The rule stated in Hopt v. The People 4 is founded

- ¹ People v. Hammill, 2 Parker Cr. 223 (1855).
- ² People v. Rogers, 18 N. Y. 9 (1858).
- * Flanigan v. The People, 86 N. Y. 554 (1881). In this case, on the trial of the defendant for murder in the first degree, the evidence showed that the prisoner was in the habit of drinking to excess, was frequently intoxicated, and had been drinking heavily on the day of the homicide. His counsel requested the court to charge that, "from all the evidence in the case, the jury may believe, if they see fit, that the prisoner may have been the victim of an appetite for drink entirely overcoming his will, and amounting to a disease; and if they did so believe, they must acquit the prisoner, unless they believe, beyond a reasonable doubt, that the act was not committed while his mind was overwhelmed by the effects of the The court refused so to charge. liquor so taken." On appeal, the refusal was held no error; and the court said that the effect of the instruction asked for would be to excuse the crime, if committed while the prisoner was laboring under intoxication, so that his will was overcome; and that the proposition was also objectionable, as it assumed that if the prisoner had been the victim of an appetite for drink, overcoming his will and amounting to a disease, he should be acquitted, although able to distinguish between right and wrong at the time of the homicide, and with respect to it. See Kenney v. The People, 31 N. Y. 330; Flanagan v. The People, 52 N. Y. 467.

^{4 104} U. S. 631. See § 450, ante.

upon the consideration that intoxication is a circumstance to be weighed in connection with the other circumstances surrounding the act, for the purpose of determining whether it was inspired by deliberate and malicious intent; and whether immediately before and at the time of his act the intoxication of the accused was so great as to render him incapable of forming a design or intent is a question for the jury, to be determined from the facts in the case, and in reference to which witnesses will not be permitted to express opinions.2 Further, since one who voluntarily becomes intoxicated is subject to the same rule of conduct and the same legal inferences as the sober man, it follows that where a provocation has been received, which, if acted upon, instantly would mitigate the offence if committed by a sober man, the question in the case of a drunken man is, whether such provocation was in truth acted upon; and evidence of intoxication may be considered in deciding that question.3

§ 453. The rules already stated were applied to cases in which the law recognizes the existence of degrees of the same crime. But it appears, further, to be a rule founded in reason and supported by the weight of authority, that whenever the intention with which an act is done is an element of the crime, intoxication, not voluntarily induced with a view to the commission of a crime while in that state, and which renders the party incapable of forming any intention, may be given in evidence for the purpose of showing either that he is not guilty of any offence, or is not guilty of the specific crime charged against him.⁴ Thus where one was indicted for passing a counterfeit bank-bill, his drunkenness at the time of the act was deemed to be a circumstance to be weighed in considering whether the act was done with such guilty knowledge

¹ Marshall's Case, 1 Lew. Cr. Cas. 76. "The fact of the party being intoxicated has indeed been holden to be a circumstance proper to be taken into consideration where the sole question is, whether an act was premeditated, or done only with sudden heat or impulse. The same may as truly be said of the passion of anger or any other excitement." Thacher, J., in Kelly v. The State, 3 S. & M. 518.

² Armor v. The State, 63 Ala. 173; People v. Belencia, 21 Cal. 544.

State v. McCants, 1 Speer, 384.

⁴ State v. Garvey, 11 Minn. 154.

as was necessary to make it a crime. So it has been held that drunkenness may produce a state of mind which would render a party incapable of forming or entertaining the intention, which is a material ingredient of the statutory offence of an assault with intent to murder.2 For it is said, where the offence charged is an act combined with an intent to commit an act not actually committed, and the jury are satisfied that the intoxication is of a degree which renders the accused incapable of entertaining the particular intent charged; and it appears that he had no such intent prior to the intoxication, nor any knowledge that he was liable, when intoxicated, to such a condition of mental disorder as would render him capable of the offence charged; that the jury must acquit. it was said further, that the general rule that one voluntarily intoxicated must be taken to intend the consequences of his acts applies only to the consequences which actually ensue, or the crime actually committed, not to an intent charged, if the defendant was at the time incapable of harboring it.8 But in its application this rule is to be carefully guarded, and although it is considered that if the defendant's mental faculties were so far overcome that he was not conscious of what be was doing, or, if he knew what he was doing, did not know why he was doing it, nor that his acts and the means he was using were naturally adapted to produce death, then he had not the capacity to entertain the intent, and the intent could not be inferred from his acts; yet if he had the capacity to form the simple intent to kill by the means used, this is sufficient to render him responsible; and his voluntary intoxication will not protect him, though his mental faculties were so far obscured that he was incapable of judging of the right and wrong of his actions.4

§ 454. In those cases where it is not necessary, in order

Pigman v. The State, 15 Ohio, 555. And see also United States v. Roudenbush, 1 Baldwin C. C. 514, where, on an indictment for passing counterfeit notes, the court charged that intoxication was no defence, if the defendant was possessed of his reason, and was capable of knowing whether the note to be passed was good or bad.

² Mooney v. The State, 33 Ala. 419.

⁸ Roberts v. The People, 19 Mich. 401.

⁴ Ibid.; and see Kelly v. Commonwealth, 1 Grant (Pa.), 484.

to convict an accused person, to allege or prove a criminal intent, intoxication is no palliation of the offence. Thus voluntary drunkenness can neither palliate nor excuse the crime of incest.1 So where the statute required deliberation and premeditation to be charged and proved in order to authorize conviction of murder in the first degree, but did not require these to be charged in an indictment either for murder in the second degree or manslaughter, it was held that, as between murder in the second degree and manslaughter, the drunkenness of the accused could not be a legitimate subject of inquiry, and that the killing being voluntary, the offence, if proved, was murder in the second degree, unless the provocation were such as to reduce it to manslaughter.2 And if the crime charged was committed, although without deliberation, in an attempt to commit another crime, for the conviction of which proof of deliberation is not necessary, it seems that the intoxication of the party cannot be admitted to repel the presumption of deliberation in regard to the crime actually charged. Thus where the accused was indicted for murder in the first degree, the jury were instructed that if he was intoxicated at the time of the act, and there was no wilful and deliberate intent to kill, but life was taken by a blow inflicted with a dangerous weapon caught up in a sudden quarrel, he should not be convicted of murder in the first degree, unless it should appear that the act was committed in an attempt to commit a rape.8

§ 455. The fact of intoxication is not conclusive evidence

¹ Colee v. The State, 75 Ind. 511.

² Pirtle v. The State, 9 Humph. 663. In this case the accused was indicted for murder in the first degree, and the fact of his insanity was permitted to be proved in order to rebut the presumption of deliberate intent, and so reduce the crime to murder in the second degree.

^{*} Kelly v. Commonwealth, 1 Grant (Pa), 484. In Hopt v. The People, 104 U. S. 631, the defendant's counsel had, in the court below, insisted on the proposition that drunkenness might be considered by the jury as bearing on the question of intent in the cases of homicide, when "the homicide is not committed by means of poison, lying in wait or torture, or in the perpetration of or attempt to perpetrate arson, rape, robbery, or burglary." This rule was approved by Gray, J., in his opinion in the case.

of the absence of criminal intent; 1 and such evidence, when proffered to show the absence of such intent, is to be received with great caution. 2 So it is said to be seldom, if ever, the duty of the court to instruct the jury that they may, from evidence of intoxication alone, infer that malicious intent was wanting. 3 When the intoxication was voluntarily produced by the party for the purpose of stimulating himself to the commission of a meditated felony, or where the party knew that drunkenness would excite in him homicidal propensities, it was held that his inebriated condition could not reduce the degree of his crime, since in placing himself in that condition he had evinced malice. 4

SECTION V.

OF PROCEEDINGS WHEN INSANITY IS ALLEGED AS A DEFENCE.

(a.) Of the Arraignment.

§ 456. Although it appear possible, or even morally certain, that a person accused of crime is so insane as to render him, in the eye of the law, irresponsible, he is nevertheless to be arraigned and put upon his trial. And a grand jury have no authority to ignore a bill for murder or other offence on the ground of the insanity of the accused person, even although it appears clearly from the testimony of the witnesses examined before them that the accused was in fact insane when the

- ¹ State v. White, 14 Kan. 538.
- ² Kriel v. The Commonwealth, 5 Bush, 362.
- State v. White, ubi supra In Smith v. The State, 4 Neb. 277, there being evidence that the prisoner was intoxicated when he committed the homicide with which he was charged, the jury were instructed that unless they were satisfied beyond a reasonable doubt that the accused at the time of the killing was in such a state of mind that he could form an intention maliciously to kill, and that he did form such an intention, they should not convict him of a higher crime than manslaughter. This instruction would seem to be an application of the rule adopted in the courts of Nebraska and elsewhere, that the burden of proof of sanity is, in all cases, upon the government in a criminal case, and that such sanity must be proved beyond a reasonable doubt. See §§ 166-169, ante, for a discussion of the authorities upon this point.
 - 4 Blimm v. The Commonwealth, 7 Bush, 320.

act charged was committed. If they believe that the act done would, if done by a person of sound mind, amount to a criminal offence, it is their duty to find an indictment, leaving the question of responsibility to be determined after the accused has been set at the bar of the court to plead. This is the rule even although the party, at the time of the inquiry, be confined as a lunatic after proper proceedings had to determine the question of his sanity.2 Thus where an indictment had been found against an insane prisoner for murder, and he had, under St. 3 & 4 Vict. c. 54, § 1, been removed, by order of the secretary of state, acting upon the certificate of two justices of the peace, to a lunatic asylum, there to be confined till it should be duly certified by two physicians or surgeons that he was of sound mind, and the governor of the asylum had made affidavit that he was in a hopeless state of insanity, the court, notwithstanding, required him to be produced at the bar, in order that his alleged insanity might be inquired into by a jury, unless it should be shown that it would be dangerous to himself or others to bring him into The court construed the statute above referred to as applicable only to those cases in which it is apparent that a prisoner is utterly incapable of taking his trial, observing that otherwise two justices could subduct a prisoner from the verdict of a jury.8 The practice in this case seems to be justified by the consideration that a person may well be in that insane condition of mind which will render his detention expedient, and yet be affected with full criminal responsibility.4

¹ Regina v. Hodges, 9 C. & P. 195.

² See Hill, ex parte, Cooper, 54; Commonwealth v. Braley, 1 Mass. 103.

⁸ Regina v. Dwerryhouse, 2 Cox C. C. 446.

So in another case, where a prisoner charged with a crime had been removed to an asylum under the authority of the same statute, Alderson, B., refused to discharge the recognizances of the prosecutor and witnesses, but respited them till the next assizes. Regina v. Cobus, 1 Cox C. C. 207. But where a prisoner charged with murder was admitted to be perfectly insane both when the act was committed and at the time of trial, and had been removed to a lunatic asylum under the statute, and afterwards indicted, Bramwell, B., held it the proper course to respite the recognizances sine die. Regina v. Blackwell, 7 Cox C. C. 353.

(b.) Of Incapacity to Plead or Defend.

§ 457. When a prisoner alleged to be insane is set at the bar to be tried, the question first to be determined is whether the accused has sufficient understanding to comprehend the nature of the trial so as to make a proper defence to the charge. And if it appear that there is no certain method of communicating the details of the trial to the prisoner so that he may clearly understand them, and be able properly to make his defence to the charge, he should not be put upon his trial. Nor is it enough to justify his trial that he may have a general capacity of communicating on ordinary matters.1 On the other hand, although the mind of the accused may be disordered to some extent, and upon some subjects, yet if he is capable of rightly comprehending his own condition in reference to his trial and of conducting or directing his defence in a rational manner, he is not to be considered insane within the meaning of the rule.2 These rules are also applied when, at the time of his arraignment, the prisoner has not reason enough, whether in consequence of intoxication or any other cause, to appreciate his peril or to act advisedly with his counsel in suggesting to them such facts as would break the force of the prosecuting evidence, and in adducing such exculpatory proof as his case will warrant.

- ¹ Rex v. Pritchard, 7 C & P. 303; Rex v. Dyson, id. 305, n.; Guagando v. The State, 41 Tex. 626.
 - ² Freeman v. The People, 4 Denio, 9.
- * Taffe v. The State, 23 Ark. 34; United States v. Haskell, 4 Wash. C. C. 409; 1 Hale P. C. 34. By the statute 33 Henry VIII. c. 20, it was enacted that if a person, being non compos mentis, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death as if he were of perfect memory. This provision was repealed by the statute 1 & 2 Ph. & M. c. 10.

Upon an inquisition of insanity, ordered on a motion for a new trial after verdict of guilty, the question is the same as if raised when the prisoner is called to plead; namely, whether the defendant was incapable of comprehending the dangerous position in which he was placed, and of taking intelligent measures to meet it. On the trial of such an inquisition the burden of proof of insanity is on the defendant, and he should open and close the case to the jury. United States v. Lancaster, 7 Bissell, 440. See Regina v. Goode, 7 Ad. & Ell. 536.

§ 458. The issue in such cases is entirely distinct from that presented when the question is in regard to the responsibility of the accused at the time of the commission of the act. Thus where a jury was empanelled to try whether a person indicted for murder was then insane, and were instructed by the court to the effect that they were to decide whether the prisoner knew right from wrong, and that if he did he was to be considered sane, the instruction was pronounced erroneous, the real question being whether the prisoner was mentally competent to make a rational defence. When, on the other hand, there being doubt of a defendant's sanity at the time of his trial, that issue was submitted to the jury, and the defendant was found to be sane, and then, upon the trial of the issue of guilty vel non, insanity was alleged as a defence, all evidence of the defendant's insanity at the time of the trial, except as it might tend to prove insanity at the time of the offence, was excluded.2

§ 459. The spirit of the common law forbids the trial, the sentencing, or the punishment of an insane person accused of crime, while he continues in that state 8 and when the mental capacity of such accused person to comprehend the nature and character of the proceedings appears doubtful upon his trial, the issue of capacity will ordinarily be determined by a jury. This would seem to have been the practice under the criminal procedure at common law even before it was authorized and prescribed by statute. Thus in Frith's Case, the defendant being upon trial at the Old Bailey for high treason, and there being some doubts as to his present sanity, the court observed that it was important to settle what the prisoner's state of mind was, and that the justice of the law had provided a remedy in such cases; and added, "I think there ought now to be an inquiry made touching the sanity of this man at this time; whether he is in a situation of mind to say what his grounds of defence here are. I know it is untrodden ground, though it is constitutional; then get a jury together to inquire into the present state of his mind; the twelve men here will

¹ Freeman v. The People, 4 Denio, 9.

² Shultz v. The State, 13 Tex. 401.

Freeman v. The People, ubi supra.

- do."1 So in Massachusetts, when from the appearance and conduct of a prisoner at the several times he was set at the bar the court were inclined to believe that he was in a state of mental derangement, and no direct or positive plea of guilty or not guilty could be obtained from him, a jury was immediately empanelled and sworn "well and truly to try between the commonwealth and the prisoner at the bar, whether he neglected or refused to plead to the indictment against him for murder, of his free will and malice, or whether he did so neglect by the act of God." And the jury having found that he did so neglect by the act of God, the accused was ordered to be remanded.²
- § 460. The question of the insanity of a prisoner at the time of trial is considered not so much an issue joined, as a preliminary inquiry for the information of the court; and it is held that although the most direct and proper method of determining that question is a trial by jury, yet other means of determining it may be adopted in the discretion of the court,
- ¹ Frith's Case, 22 State Tr. 808 (1790). The jury found the prisoner insane, and he was remanded. No report appears of his subsequent arraignment.
- ² Commonwealth v. Braley, 1 Mass. 103 (1804). In Turner's Case, cited Shelf. Lun. 597, the jury were sworn to try "whether the prisoner is insane by visitation of God, or whether of deceit and covin he counterfeits insanity." In Regina v. Goode, 7 Ad. & El. 536, the issue framed was "whether J. H., the defendant, be insane or not."

Where habeas corpus was brought in favor of a complainant under indictment for murder, and evidence was put in at the hearing strongly tending to show his present insanity, the court determined that he should be released on bail. Zembrod v. The State, 25 Tex. 519.

* Regina v. Davies, 3 C. & K. 328; s. c. 6 Cox C. C. 326. In this case Williams, J., held that the prosecution should begin and produce evidence of the defendant's sanity, which the counsel for the prisoner might rebut, and that on the failure of the prosecution to produce such evidence the court might examine witnesses or postpone the trial.

Under a statute providing that the plea of insanity at the time of trial should be tried by a special jury, it was held that such a plea should contain the distinct allegation of present insanity although it might cover insanity at the time of the act; it being in its nature a plea the object of which is to prevent a trial on the merits. Long v. The State, 38 Ga. 491. See Irwin's Code, Ga. § 4299 (2d ed.); Anderson v. The State, 42 Ga. 9.

in the absence of statute provisions providing for a jury trial in such cases. And it seems that it is competent for the court to order the respective questions, of present insanity and of guilty vel non, to be determined before the same jury, who may render a special verdict upon the double issue framed for their consideration by the court.² Where a prisoner had been arraigned on two indictments, and had, with apparent intelligence, pleaded to one and declined to plead to the other, and the plea of not guilty was entered for him under the statute with assent of his counsel, who afterwards, in course of the case, suggested that the defendant was then insane, or not in a fit mental condition to be tried, it was held that the proper time for making this suggestion was before the prisoner pleaded, and that, had it been so made, a jury would have been empanelled to try the question; but as the trial had begun, it would be inconvenient to recommence the trial of the collateral issue, and, as it appeared that the evidence as to the prisoner's general sanity was very much mixed with the question of his sanity at the time of the act charged, it was proper, under St. 39 Geo. III. c. 95, to submit the whole of the evidence and leave to the determination of the jury the questions as to the prisoner's state of mind, both at the time of the act and at the time of the trial.8

§ 461. Although, if there be a doubt as to the prisoner's sanity at the time of his arraignment, he is not to be put upon trial until the preliminary question is tried by a jury,⁴ the

¹ Freeman v. The People, 4 Denio, 9.

² Rex v. Little, Russ. & R. 430.

Regina v. Southey, 4 F. & F. 864. But in Gruber v. The State, 3 W. Va. 699, it was held that when doubt of the prisoner's sanity arises after a jury has been empanelled to try the main issue, the court should suspend the trial and empanel another jury to inquire into his present sanity.

^{*} Rex v. Lev. 1 Lew. C. C. 239. In Guagando v. The State, 41 Tex. 626, it was said that when an affidavit is made by a respectable person that the defendant has become insane since the act, that issue should be tried by a jury before proceeding to the main issue, even although the affiant be unknown. So if such affidavits be offered after conviction and before judgment, judgment must be suspended until the fact can be tried, and if filed after judgment and before execution, execution must likewise be stayed. State v. Vann, 84 N. C. 722.

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question of the existence of such a doubt seems to be exclusively for the determination of the court. And counsel for the defendant can neither waive an inquiry as to the question of the defendant's sanity, nor compel the court to enter upon such an inquiry when no ground for doubting it appears. So where, after verdict and judgment, the defendant by his counsel alleged as a reason why sentence should not be pronounced that the defendant was a lunatic, it was held that if the court on its own inspection was satisfied that the allegation of insanity was false, it might properly proceed to pass sentence without empanelling a jury to try the question. But it was added, that if the court should entertain any doubt

People v. Ah Ying, 42 Cal. 18; and see State v. Klinger, 46 Mo. 224. But where, after the case against the prisoner had closed, his counsel alleged his insanity and proffered evidence in support of the allegation, and the defendant repudiated the defence and discharged his counsel, and the court gave the case to the jury, this was held to be error, the appellate court remarking that the case was without precedent. State v. Patten, 10 La. Ann. 279.

² In Massachusetts it is provided by statute that if a person convicted of a capital crime is, at the time when the motion for sentence is made, "found to the satisfaction of the court to be insane, the court may cause such person to be removed to one of the state lunatic hospitals for such a term and under such limitations as it may direct." So when it appears to the satisfaction of the governor and council that a convict under sentence of death has become insane, "the execution of said sentence may be respited by the governor . . . from time to time for stated periods, until it appears to their satisfaction that the convict is no longer insane." Pub. Sts. Mass. c. 215, §§ 34, 35. In the same state statutory provision is made for the examination of prisoners alleged insane, detained in the state or reformatory prisons, and the removal of such prisoners if insane to one of the state lunatic hospitals. Pub. Sts. Mass. c. 222, § 10. In New York it is provided that when a prisoner sentenced to death appears to be insane or irresponsible, a commission may be appointed to investigate the case and report thereon; and if the convict appears to be insane, he may be committed by the governor to the State Lunatic Asylum for Insane Criminals, until recovery. See Acts 1874, c. 446, tit. 1, art. 2, § 21; 1876, c. 267, § 1; Standerman, in re, 3 Abb. N. C. 187. It is held not essential to the confinement of a criminal lunatic that an inquisition or report of the commissioners made under these acts, and finding the recent existence of insanity at the time of the commission of the act, should state that the person continues insane. Jenisch's Case, 3 Abb. N. C. 200. See the statutes above referred to for general provisions as to the disposition, care, and custody of insane prisoners and convicts.

on the subject, or the question should appear difficult, a venire should issue, returnable instanter, to ascertain the fact. And the question whether an inquiry is called for by the circumstances of the case is for the determination of the court, who may also direct the manner in which such inquiry shall be conducted. Error will not lie to review the proceedings upon such an inquiry, whether the allegation of insanity be made before or after the conviction of the prisoner. So it is held that, the jury having, upon the preliminary inquiry, found the prisoner sane at the time of trial, the trial of the main issue will not be postponed because of an appeal upon the issue of present insanity.

§ 462. Where a prisoner has been found in an unfit condition to be tried by reason of his present insanity, and he is afterwards arraigned again upon the same indictment, it is held to be unnecessary that the former verdict of present insanity should be vacated by another trial upon that issue before the court can proceed with the trial of the main issue presented by the indictment; but if there is still any doubt as to the sanity of the defendant, the court should proceed to try the question of present insanity anew, and so on, as often as occasion may require. On all such trials, the question being as to the present sanity of the defendant, the former verdict or verdicts upon the same issue may be received in evidence as tending to prove present insanity.4

(c.) Conduct of Trial.

§ 463. Since a prisoner so insane as to be criminally irresponsible may, and generally does, lack capacity to appreciate

¹ Bonds v. The State, 1 M. & Yerg. 143; and see 1 Hawk. P. C. 3, n. See, to the same effect, Laros v. The Commonwealth, 84 Penn. St. 200.

Inskeep v. The State, 35 Ohio St. 482; 36 Ohio St. 145. This case was decided under the local statute (74 Ohio Laws, p. 339, § 1), providing that on suggestion, and a physician's certificate, of the defendant's present insanity a jury shall be empanelled to try the question; but it is apprehended that the rule adopted is applicable in all jurisdictions where the local law does not provide for a review or appeal upon the like issue.

People v. Moice, 15 Cal. 329. See Penal Code, Cal., ch. vi. §§ 14,367–14,373.

⁴ People v. Farrell, 31 Cal. 576.

his own condition, it is obvious that the defence of insanity may be put forward and proved in favor of such a prisoner, although the prisoner himself repudiate this defence in open court. Thus in an English case the defence of insanity was alleged on an indictment for murder. The prisoner repudiated the defence, alleging that he was not insane, and was allowed to suggest questions to the witnesses for the prosecution for the purpose of contradicting the allegation of his insanity; and the court allowed additional witnesses to be called at his request for the same purpose. The prisoner was acquitted on the ground of insanity.¹ By the common law, evidence of insanity is admissible upon the general plea of not guilty.²

§ 464. In cases where present insanity on the part of the prisoner is alleged, and he stands mute or refuses to plead on his arraignment, the usual course in the English courts is to submit three points to the jury: (1) Whether the prisoner is mute of malice or not; (2) whether he can plead to the indictment or not; and (3) whether he is of sufficient intellect to comprehend the course of the proceedings. Since the inquiry is limited to the mental condition of the prisoner in respect of the proceedings, it is held that the jury may form an opinion as to his capacity from his demeanor exhibited during the inquiry, and may find him insane without any evidence being given as to his state; and, further, that it is unnecessary to ask him whether he will cross-examine the witnesses, if any testify, or offer any remarks on the evidence.4

§ 465. Since the presumption of law, in the first instance, is considered to establish the prisoner's sanity, it follows that the insanity is a fact to be proved affirmatively. This is the rule even in those jurisdictions where it is held that the burden of proving intellectual capacity of the prisoner is, technically, on the prosecutor; for the application of the

¹ Regina v. Pearce, 9 C. & P. 667; and see United States v. Guiteau, Official Report by Alexander & Easton, passim.

² See § 158, ante, note.

^{*} Rex v. Pritchard, 7 C. & P. 303; Rex v. Dyson, id. 305, n.; and see Thompson's Case, 2 Lew. C. C. 137; Regina v. Whitfield, 8 C. & K. 121; Regina v. Israel, 2 Cox C. C. 263.

⁴ Regina v. Goode, 7 Ad. & El. 536.

latter rule is held not to be called for until the issue of insanity is opened by the production of evidence of its existence on the side of the defence. The evidence of insanity being produced, it is for the court to decide, as matter of law, whether such evidence is sufficient to be submitted to the jury upon the issue.2 It is considered to be the duty of the court to charge the jury, specifically, upon the law of insanity, when evidence sufficient to raise the issue appears in the case, with or without a request so to charge, made in behalf of the prisoner.⁸ In England, if upon a trial for treason, murder, or felony, or any misdemeanor, evidence of insanity at the time of the act is produced, and the jury acquit the prisoner, they must be required to find specially whether he was insane at the time of committing the act charged, and whether he was acquitted on that account.4 Similar provisions occur in the statutes of many of the United States.⁵

(d.) Detention of Insane Defendants.

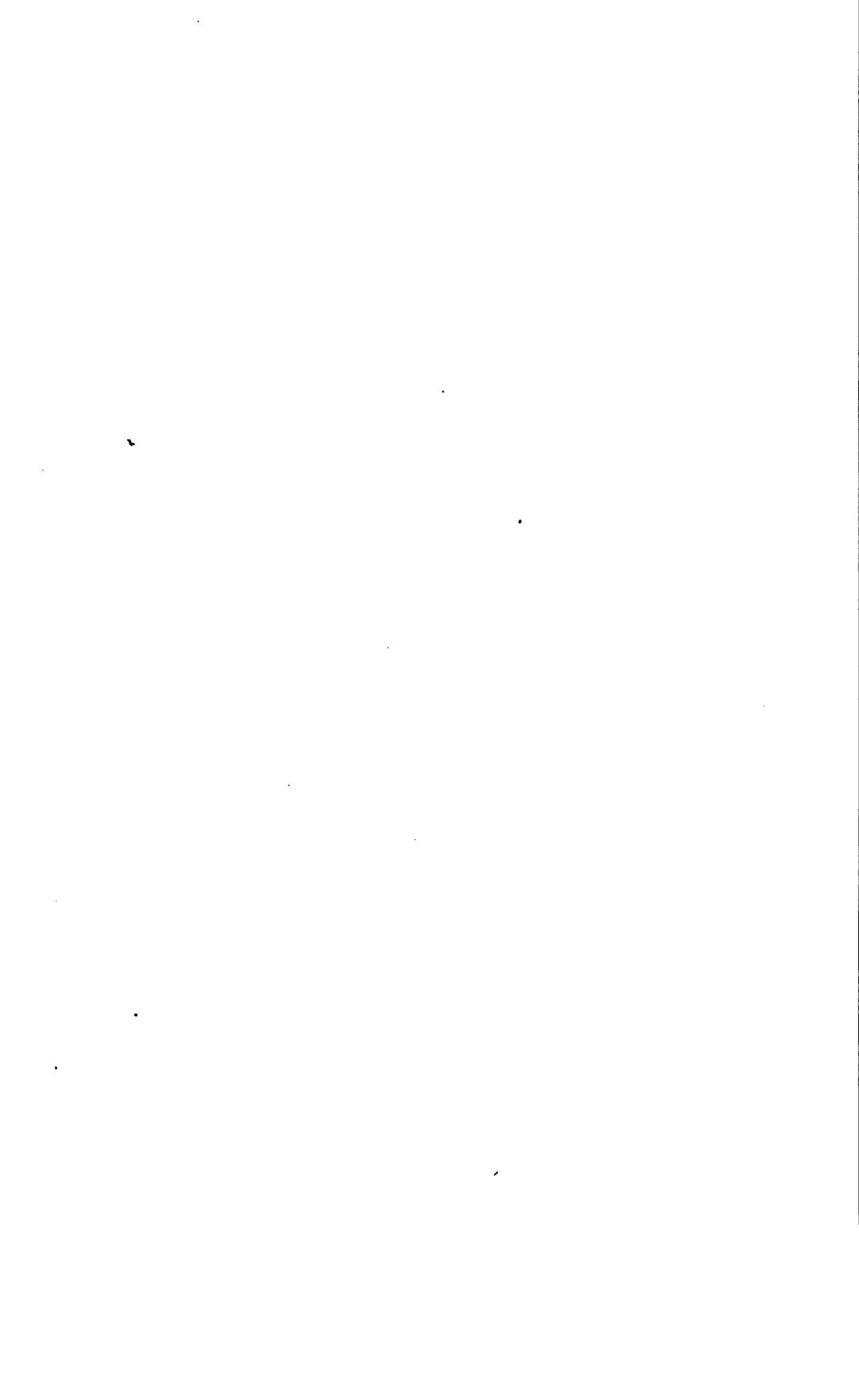
§ 466. The statutes in England provide for the detention and proper custody, until the crown's pleasure be known, of persons acquitted of crime on account of their insanity at the time of the commission of the offence and continuing to the time of trial, and similar provisions exist in many of the

- ¹ Brotherton v. The People, 75 N. Y. 159; People v. Garbutt, 17 Mich. 10; §§ 168, 169, ante, and cases cited.
- ² Regina v. Law, 2 F. & F. 836, n.; People v. Best, 39 Cal. 690; §§ 154–157, ante, and cases cited.
 - * Thomas v. The State, 40 Tex. 60; § 158, ante, and cases cited.
- 4 Act 46 & 47 Vict. c. 38, § 2. See Rex v. Burrow, 1 Lew. C. C. 238; Rex v. Little, Russ. & R. 430.
- In Massachusetts, when a person is acquitted by reason of insanity, the jury are to state that fact to the court, and thereupon the court, if satisfied that he is insane, may order him to be committed under such limitations as may seem proper, or, in cases of murder or manslaughter, for life. Such person may afterwards be discharged by the governor, with the advice and consent of the council, it appearing that this may be done without danger to others. Pub. Sts. Mass. c. 214, §§ 19-21. See following section.
- *Act 39 & 40 Geo. III. c. 94, § 1. This provision is extended to Ireland. See acts 1 & 2 Geo. IV. c. 33, §§ 16, 17; 1 & 2 Vict. c. 27; 8 & 9 Vict. c. 100, §§ 10, 11; 46 & 47 Vict. c. 38, § 2.

United States. But the authority of the courts to order such detention is recognized by the common law, and has often been exercised in the absence of statute provision on the subject.2 Thus where one had been acquitted on the ground of insanity, the court remanded him to the custody of the marshal, on being satisfied that it would be dangerous to permit him to be at large while suffering from mental delusion.8 And where a guardian had been appointed for an insane person who afterwards committed a homicide, and was thereupon confined, under the authority of a statute, as a dangerous person, and upon his subsequent trial for the homicide he was acquitted on the ground of his insanity, the court ordered him to be remanded till discharged by due order of law.4 A person acquitted of crime by reason of his insanity, and thereupon detained, whether by virtue of the common-law prerogative of the courts or under statute authority, has a right thereafter to a judicial determination of the question of his insanity.⁵ And a statute providing for the detention of such persons in prison until proceedings had for such determination, the institution of the proceedings being optional with the prison inspectors,6 was pronounced to be in plain violation of the constitutional safeguards against restraints of personal liberty without due process of law.7

Note. — As relating to topics considered in sec. v. of this chapter, see Criminal Lunatics Act of Aug. 14, 1884 (47 & 48 Vict. c. 64), App. p. 540, the text of which was received while the present work was in press.

- ¹ See § 461, ante, note.
- ² 1 Hale P. C. 32, 35; Somerville's Case, Anderson, pt. 1, No. 154; Frith's Case, 22 St. Tr. 808.
 - * United States v. Lawrence, 4 Cranch C. C. 514.
- Commonwealth v. Meriam, 7 Mass. 168. See also Commonwealth v. Braley, 1 Mass. 103; People v. Griffin, Edmonds, 126. In M'Dermott, in re, 3 Dru. & War. 480, a lunatic who had been convicted of an assault, but the period of whose imprisonment for the offence had expired, was ordered to be transferred to such private asylum as the committee of the person, with the approbation of the master, should direct.
 - ⁵ See §§ 19, 20, 24, ante.
 - ⁶ Mich. Laws, 1873, Act No. 168.
 - ⁷ Underwood v. The People, 82 Mich. 1.



APPENDIX.

ENGLISH LUNACY STATUTES.

DE PREROGATIVA REGIS. 17 EDWARD IL

CHAPTER IX.

HIS PREROGATIVE IN THE CUSTODY OF LANDS OF IDIOTS.

REX habet custodiam terrarum | THE KING shall have the custody fatuorum naturalium capiendo exi- of the lands of natural fools taking tus earundem sine vasto & destruc- the profits of them without waste tione, & inveniet eis necessaria or destruction, and shall find sua de cujuscumque feodo terre them their necessaries, of whose ille fuerint, & post mortem eorum fee soever the lands be holden. reddat eas rectis heredibus ita (2.) And after the death of such quod nullatenus per eosdem fatuos Idiots, he shall render it to the alienentur vel eorum heredes exheredentur.

right heirs, so that such Idiots shall not aliene, nor their heirs shall be disinherited.

CHAPTER X.

HIS PREROGATIVE IN THE PRESERVATION OF THE LANDS OF LUNATICKS.

quis qui prius habuit memoriam & intellectum non fuerit compos mentis seu sicut quidam sunt per menta eorundem salvo custodian-

ITEM habet providere quando ali- | Also THE King shall provide, when any (that before time hath had his wit and memory) happen to fail of his wit, as there are many per lucida intervalla quod terre & tene- lucida intervalla, that their lands and tenements shall be safely kept tur sine vasto & destructione & without waste and destruction, and

competenter & residuum ultra suscustodiatur ad opus ipsorum liberandum eis quando memoriam re-Ita quod predicte cuperaverint. terre & tenementa infra predictum tempus non alienentur. Nec Rex de exitibus aliquid percipiat ad king shall take nothing to his own opus suum & si obierit in tali statu tunc illud residuum distribuatur pro anima ejusdem per consilium ordinariorum.

quod ipse & familia sua de exitibus; that they and their household shall earundem vivant & sustineantur live and be maintained competently with the profits of the same, and tentationem eorundem rationabilem the residue besides their sustentation shall be kept to their use, to be delivered unto them when they come to right mind; (2) so that such lands and tenements shall in no wise be aliened; (3) and the use. (4) And if the party die in such estate, then the residue shall be distributed for his soul by the advice of the ordinary.

2d and 3d EDWARD VI. c. viii. (1548).

AN ACT FOR FINDING OF OFFICES BEFORE ESCHEATORS.

Section VI. — As to Traverse of Inquisition.

Also, when one person or more is or shall be founden heir to the King's tenant, by Office or Inquisition, where any other person is or shall be heir; (2) or if one person or more be or shall be founden heir by Office or Inquisition in one county, and another person or persons is or shall be found heir to the same person in another county; (3) or if any person be or shall be untruly founden Lunatic, idiot or dead: (4) be it enacted by the authority aforesaid, That every person and persons, grieved or to be grieved by any such Office or Inquisition shall and may have his or their Traverse to the same immediately or after, at his or their pleasure, and proceed to trial therein, and have like remedy and advantage as in other cases of Traverse upon untrue Inquisitions or Offices, founden; any law, usage, or custom to the contrary in any wise notwithstanding.

LUNACY REGULATION ACT,

16 & 17 Vict., Cap. 70.1

An Act for the Regulation of Proceedings under Commissions of Lunacy and the Consolidation and Amendment of the Acts respecting Lunatics so found by Inquisition, and their Estates.

[15th August, 1853.]

For removing or diminishing the delays and expenses now attending on the execution of Commissions in the nature of Writs de Lunatico Inquirendo, and the proceedings consequent on Inquisitions taken thereon, and for regulating and amending the practice and course of procedure in matters of Lunacy, and for consolidating and amending the several Acts of Parliament respecting the care and management of the persons and estates of Lunatics so found by Inquisition, and the appointments, duties, and salaries of Officers in Lunacy, be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. The several Acts of Parliament mentioned in the first Acts and schedule hereunder written shall be and the same are hereby Acts repealed, to the extent specified concerning the same Acts named in respectively in the third column of the same schedule, but so ule rethat the validity of any proceeding taken or pending under pealed, but the said Acts or any of them, before or at the commencement validity of proceedof this Act, or any appointments, salaries, annuities, com- ings, &c., pensations, or allowances made or given by or under the said affected. Acts or any of them, before the commencement of this Act, shall not be taken away, diminished, or in anywise injuriously affected by the repeal aforesaid; and no new or further order, minute, or direction whatsoever shall be deemed to be necessary by reason or in consequence of the repeal aforesaid, respecting any such appointment, salary, annuity, compensation, or allowance as aforesaid, except where by this Act any salary or other payment is made payable out of a fund not

not to be

¹ Vide also Amendment Acts: 18 Vict. c. 18 (1855); 25 & 26 Vict. c. 86 (1862), post.

ceeding in existing

Mode of pro- heretofore chargeable therewith; and all proceedings respecting the person or estate of every person before the commencement of this Act, found by Inquisition idiot, Lunatic, or of unsound mind, and incapable of managing himself or his affairs, or any proceedings for the purpose of procuring such a finding, shall be carried on, as far as may be practicable, according to the provisions of this Act, and, subject thereto, according to the provisions of the said Acts or any of them, which shall for that purpose be deemed to continue in force notwithstanding the repeal aforesaid, or in case of doubt as to the mode of procedure in such of the modes aforesaid as the Masters in Lunacy shall direct.

Interpretation of terms.

II. In this Act, unless there be something in the subjectmatter or context repugnant to the construction,1 —

The expression "the Lord Chancellor" shall be construed to mean the Lord High Chancellor of Great Britain for the time being, and to include or be applicable to the Lord Keeper or Lords Commissioners for the custody of the Great Seal of the United Kingdom for the time being;

And the expression "the Lord Chancellor intrusted as aforesaid" shall be construed to mean the Lord High Chancellor of Great Britain for the time being intrusted by virtue of the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of persons found idiot, Lunatic, or of unsound mind; and when and so long as the Lords Justices of the Court of Appeal in Chancery for the time 2 being shall be intrusted as aforesaid concurrently with the Lord Chancellor, then and so long the last-mentioned expression

¹ Vide 25 & 26 Vict. c. 86, secs. 1, 2, post; 18 Vict. c. 13, post.

² By sec 7 of the Supreme Court of Judicature Act, 1878, Amendment, 88 & 89 Vict. c. 77 (1875), it is enacted that "Any jurisdiction usually vested in the Lords Justices of Appeal in Chancery, or either of them, in relation to the persons and estates of idiots, lunatics, and persons of unsound mind, shall be exercised by such Judge or Judges of the High Court of Justice or Court of Appeal as may be intrusted by the Sign Manual of Her Majesty or her successors with the care and commitment of the custody of such persons and estates; and all enactments referring to the Lords Justices as so intrusted shall be construed as if such Judge or Judges so intrusted had been named therein instead of such Lords Justices: Provided that each of the persons who may at the commencement of the principal Act be Lords Justices of Appeal in Chancery shall, during such time as he continues to be a Judge of the Court of Appeal. and is intrusted as aforesaid, retain the jurisdiction vested in him in relation to such persons and estates as aforesaid."

shall be construed to include or be applicable to the Lords Justices aforesaid, so that all the powers, authorities, and duties to be had, exercised, and performed under this Act by the Lord Chancellor intrusted as aforesaid shall and may be had, exercised, and performed as well by the Lord Chancellor acting either alone or jointly with both or either of the Lords Justices aforesaid, as by both of the Lords Justices aforesaid acting jointly apart from the Lord Chancellor;

And the expression "the Lords Justices" shall be construed to mean the Lords Justices aforesaid for the time

being, or one of them;

And the expression "the Lord Chancellor of *Ireland*" shall be construed to comprehend the Lord Keeper or Lords Commissioners for the custody of the Great Seal of *Ireland* for the time being;

And the expression "the Masters" shall be construed to mean the Masters in Lunacy for the time being, jointly or severally;

And the expression "the Registrar" shall be construed to mean the Registrar in Lunacy for the time being;

And the word "Commission" shall be construed to mean a Commission in the nature of a Writ de Lunatico Inquirendo, and to comprehend the General Commission by this Act authorized to be issued;

And the word "land" shall be construed to comprehend any manor, messuage, tenement, hereditament, or real property of whatsoever tenure, and also property of every description transferable otherwise than in books kept by any company or society, or any share thereof or charge thereon, or estate or interest therein;

And the word "stock" shall be construed to comprehend any fund, annuity, or security transferable in books kept by any company or society, or any money payable for the discharge or redemption thereof, or any share or interest therein;

And the word "dividends" shall be construed to comprehend interest or other annual produce;

And the provisions relating to "the Bank of England" shall be construed to extend and be applicable to the East India Company, the South Sea Company, and every other company or society established or to be established;

And the word "conveyance" shall be construed to comprehend any release, surrender, assignment, or other assurance, including all acts, deeds, and things necessary for making and perfecting the same;

And the word "transfer" shall be construed to comprehend any assignment, payment, or other disposition;

And the word "Lunatic" shall be construed to mean any person found by Inquisition idiot, lunatic, or of unsound mind, and incapable of managing himself or his affairs;

And the expression "next of kin" shall be construed to refer to the next of kin of a Lunatic, and to comprehend his heir or heirs at law, and also the person or persons who would be entitled to his estate, or to shares thereof, under the statutes for the distribution of the effects of intestates, in case he were dead intestate;

And the word "person" or "party" shall be construed to comprehend a body corporate.

Schedules parts of Act.

III. The schedules hereunder written shall be deemed to be parts of this Act.

Extent of Act.

IV. This Act shall extend to England and Wales, and to Ireland where the same is specifically mentioned.

Commencement and Short Title of Act.

Officers.

V. This Act shall take effect from the 28th day of October, 1853, and may be cited as "The Lunacy Regulation Act, 1853."1

And with respect to the several officers in Lunacy, be it further enacted as follows: -

Power to Lord Chancellor to appoint two Masters in Lunacy, acting, shall take Oath in the second Schedule.

VI. There shall be two Masters in Lunacy, who shall hold their offices during good behaviour, and the present Masters in Lunacy shall be continued and be the Masters in Lunacy during good behavior, and the Lord Chancellor shall, from who, before time to time as any vacancy shall occur in the office of Master in Lunacy, appoint a fit person, being a serjeant or barristerat-law of not less than ten years' standing at the bar, to fill the vacancy, and the person to be so appointed shall, before being capable of acting as Master in Lunacy, take before the Lord Chancellor, in the manner now used, the oath set forth in the second schedule hereunder written, and the Masters in Lunacy for the time being shall have the same rank and precedence as the present Masters now take.

Masters to have Powers of Commissioners.

VII. The Masters in Lunacy shall have, perform, and execute all the powers, duties, and authorities which were at the time of the passing of the Act of the session of Parliament holden in the fifth and sixth years of the reign of her

¹ Vide 25 & 26 Vict. c. 86, secs. 1, 2, post. Vide 18 Vict. c. 18, post.

Majesty, chapter eighty-four, had, performed, and executed by Commissioners named in Commissions in the nature of Writs de Lunatico Inquirendo.

VIII. All the inquiries and matters connected with the All referpersons and estates of Lunatics which were at the time of the ences connected passing of the last-mentioned Act of Parliament usually re-with Lunaferred to the Masters in Ordinary of the High Court of Chan-tics to be made to cery (except inquiries and matters which may be or might have Masters. been referred under the Trustee Act, 1850, or any Act thereby repealed), shall henceforth, where references shall be made, be referred to the Masters in Lunacy, who shall have, perform, and execute all the powers, duties, and authorities relating to the inquiries and matters so to be referred to them as aforesaid which were at the time last aforesaid had, performed, and executed by the Masters in Ordinary of the High Court of Chancery, and shall perform such other duties for the security and advantage of Lunatics and their estates as the Lord Chancellor intrusted as aforesaid shall from time to time direct.

IX. All the powers and authorities by or under this Act Masters to vested or to be vested in the Masters shall be joint and duties under several, and they shall execute Commissions and conduct Regulations Inquiries connected with Lunatics or their estates, and per-Chancellor. form all other duties committed or to be committed to them by or by virtue of any Act hereby repealed or this Act, either separately or together, and at such places, within such times, and in such manner as any General Order in Lunacy, and subject thereto, as any Special Order of the Lord Chancellor intrusted as aforesaid shall from time to time direct.

X. The Lord Chancellor shall have, as at present, an officer Registrar to called "the Registrar in Lunacy," who shall perform the duties under duties committed to him by or by virtue of this Act, and such Regulations other duties connected with Lunatics and their estates, at Chancellor. such places, within such times, and in such manner, as the Lord Chancellor shall from time to time direct.¹

XI. The Masters and the Registrar respectively shall con- Duties of tinue to discharge all duties which formerly belonged to the Custodies to office of Clerk of the Custodies of Idiots and Lunatics, and be perwhich were, under the provisions of the Act of the session Masters and

Registrar.

¹ Vide 25 & 26 Vict. c. 86, secs. 28, 29, post.

of Parliament holden in the fifth and sixth years of the reign of Her Majesty, chapter eighty-four, on the abolition of that office, transferred to them respectively, so far as the same may be necessary to be discharged, according to the practice for the time being subsisting in Lunacy.

As to the Masters' nuities.

XII. The Masters shall receive salaries of Two thousand Salaries and pounds per annum each; and the Lord Chancellor may, on a retiring An- Petition presented to him for that purpose, order (if he shall so think fit) annuities, not exceeding the sum of One thousand two hundred pounds each, to be paid to the persons continued and to be appointed Masters respectively, if and when they respectively shall be afflicted with some permanent infirmity disabling them respectively from the due execution of their respective offices, and shall be desirous of resigning the same.1

Power to Lord Chancellor to remove, and grant Annuities to future Masters, if afflicted with infirmity.

XIII. The Lord Chancellor may by Order remove any one of the Masters in Lunacy to be appointed after the commencement of this Act, who shall be afflicted with any permanent infirmity disabling him from the due execution of his office, and who shall refuse to resign or be incapable of resigning the same, and may, upon such removal, order to be paid to him an annuity or retiring allowance not exceeding in amount two equal third parts of his yearly salary.2

Salary of Registrar.

XIV. The Registrar shall receive such salary as the Lord Chancellor, with the approbation of the Commissioners of Her Majesty's Treasury, has directed or shall from time to time direct.

Number and Salaries of and the Registrar.

XV. Such officers, clerks, and messengers shall and may the Clerks of be from time to time appointed by the Masters and the Registhe Masters trar respectively in their respective offices as the Lord Chancellor, with the approbation of the Lords Commissioners of Her Majesty's Treasury, has directed or shall from time to time direct, but the appointment of the Chief Clerk of the Masters shall be made with the approbation of the Lord Chancellor; and the present officers, clerks, and messengers shall be continued as if this Act had not been passed, and without prejudice to any right or claim of them or any of them in respect of length of service or otherwise; and the

¹ Vide 25 & 26 Vict. c. 86, secs. 23-28, post.

² Vide same.

³ Vide same.

officers, clerks, and messengers for the time being shall respectively receive such salaries as the Lord Chancellor, with the approbation of the said Commissioners of the Treasury, has directed or shall from time to time direct.1

XVI. There shall be two medical visitors and one legal Power to visitor of Lunatics, [who shall hold their offices during pleas- Chancellor ure; and the present visitors shall be continued and be the to appoint visitors during pleasure;] and the Lord Chancellor shall, Visitors. from time to time as any vacancy shall occur in the office of medical visitor or legal visitor, appoint, by writing under his hand, a fit person, being a physician in actual practice, to succeed a medical visitor, and a fit person, being a barrister of not less than five years' standing, to succeed a legal visitor.²

XVII. The Masters for the time being shall, by virtue of Masters to their appointments to be Masters, become and be visitors of be ex officio Lunatics jointly with the visitors for the time being.

XVIII. No person shall be appointed to be a visitor who Visitors not shall be or shall have been within the two years then next to be interested in preceding directly or indirectly interested in the keeping of Houses for any house licensed for the reception of insane persons; and Insane Perif any person shall after his appointment become so interested, sons. his appointment as visitor shall ipso fucto become null and void, and thereupon his salary shall cease.

[XIX. The Medical Visitors shall receive such salaries, Salaries of not exceeding the sum of Five hundred pounds per annum Visitors. each, and the Legal Visitor to be appointed after the commencement of this Act, shall receive such salary, not exceeding the like sum, as the Lord Chancellor, with the approbation of the said Commissioners of the Treasury, shall from time to time order; and the salary of the present Legal Visitor shall remain at its present amount.87

XX. The Medical and Legal Visitors and the Masters, or The Visitors so many of them, not being less than three in number, as and Masters may from time to time be able, consistently with the discharge Board. of their other duties, to attend, shall from time to time form

1 Vide 25 & 26 Vict. c. 86, secs. 28-28, post.

Repealed by Act 38 & 89 Vict. c. 66.

² Vide same Act, sec. 24. The portion of the clause in brackets was repealed by the Stat. Law Revision Act, 1875, 88 & 89 Vict. c. 66.

themselves into a Board for their mutual guidance and direction on matters connected with the visiting of Lunatics; and the Board shall be at liberty to report to the Lord Chancellor intrusted as aforesaid upon any matter connected with the duties of the Visitors or of the Board, as they think proper.

Medical or Legal Visitor may appoint a substitute during his illness, &c.

XXI. Where a Medical or a Legal Visitor is temporarily prevented from discharging his duty by illness or unavoidable absence, but not otherwise, he may, with the approbation of the Lord Chancellor intrusted as aforesaid, appoint a physician in actual practice, or a barrister of not less than five years' standing (as the case may require), to act in his stead during his illness or unavoidable absence; and the physician or the barrister so appointed shall while his appointment remains in force, have, perform, and execute all the powers, duties, and authorities belonging to the office of Medical Visitor or of Legal Visitor (as the case may be) with full validity and effect to all intents and purposes.

Lord Chancellor to appoint a Secretary to Visitors.

XXII. There shall be a Secretary to the Visitors, who shall hold his office during pleasure; and the present Secretary shall be continued and be the Secretary during pleasure; and the Lord Chancellor shall, from time to time as a vacancy shall occur in the office of Secretary, appoint, by writing under his hand, a fit person to fill the vacancy.¹

The Salary of the Secretary and his Clerk.

XXIII. The Secretary shall receive such salary, not exceeding the sum of Three hundred pounds per annum, as the Lord Chancellor has ordered or shall from time to time order; [and a clerk to the Secretary may be appointed by him, with the approbation of the Lord Chancellor, who shall receive such salary, not exceeding the sum of One hundred and fifty pounds per annum, as the Lord Chancellor shall from time to time order.] ²

Masters, Visitors, &c., to be allowed travelling and other expenses. XXIV. Such allowances as the Lord Chancellor, with the approbation of the said Commissioners of the Treasury, shall from time to time order, shall be made to the Masters and the Visitors for their respective travelling and other expenses, and to the Masters and the Registrar, and the Secretary to

² Vide 25 & 26 Vict. c. 86, sec. 25, post, repealing the clause of this section within brackets.

¹ The office of Secretary to the Visitors is abolished by sec. 31 of the Supreme Court of Judicature Act, 1873, Amendment 38 & 39 Vict. c. 77 (1875), and the section xxii. is now also repealed.

the Visitors (but in the latter case under the direction of the Visitors), for providing and maintaining suitable offices, and for the other expenses incident to the discharge of the duties of their respective offices.

XXV. All salaries and annuities continued or given by or Salaries, under this Act (inclusive of the salaries of the Visitors and &c., to be paid quartheir Secretary, as from the day on which the account entitled terly, out of "The Account of the Board of Visitors for the Better Care Suitors' Fee and Treatment of Lunatics" shall be closed as hereinafter mentioned) shall grow due from day to day, and the same, with all allowances continued or given by or under this Act (inclusive of the allowances to the Visitors and their Secretary as from the same day), shall be payable and paid under order of the Lord Chancellor to the several persons entitled thereto, or to their respective Executors or Administrators, out of the fund standing in the name of the Accountant-General of the Court of Chancery to the account entitled "The Suitors' Fee Fund Account," on the third day of February, the third day of May, the third day of August, and the third day of November in every Year, or on such other days as the Lord Chancellor shall from time to time direct, free from deduction; and all such salaries, annuities, and allowances as aforesaid which are continued by or under this Act shall be payable out of the aforesaid fund in such priority as they respectively would have had if the several Acts hereby repealed had not been repealed; and all such salaries, annuities, and allowances as aforesaid which are or shall be originally by or under this Act charged upon the aforesaid fund shall be payable and paid out of the same fund, subject and without prejudice to the payment of all other sums of money by any former Act or Acts now in force directed or authorized to be paid thereout.1

And whereas it would greatly facilitate the simplification Percentage and improvement of the Practice in Lunacy, and would be and Fees. attended with convenience, and with a saving of expense to the estates of Lunatics, that the charges incident to the administration of the estates of Lunatics under the authority of the Lord Chancellor should be defrayed in part by means of a percentage, graduated in an equitable manner as between the richer and poorer estates, and in part by means of fees on proceedings: Be it therefore enacted as follows: —

1 Vide 25 & 26 Vict. c. 86, sec. 27, post, and also, "The Courts of Justice (Salaries and Funds) Act, 1869," 82 & 38 Vict. c. 91.

Percentage on clear Incomes to be ing to the Scale herein specified.

XXVI. A percentage on the respective clear annual incomes of all Lunatics shall be paid according to the several paid accord-rates following; that is to say, —

> The rate of four per Centum for each clear annual income amounting to One hundred pounds and not amounting to One thousand pounds, but so that no larger sum be payable in any such case in any one year than Thirty pounds;

> The rate of three per Centum for each clear annual income amounting to One thousand pounds and not amounting to Five thousand pounds, but so that no larger sum be payable in any such case in one year than One hundred pounds; and

> The rate of two per Centum for each clear annual income amounting to Five thousand pounds or upwards, but so that no larger sum be payable in any such case in any one year than Two hundred pounds:

And in every case the fractional parts less than one moiety in the pound sterling shall be disregarded in the calculation of the amount payable for percentage, and shall not be levied or paid.1

Masters to certify amount,&c.. which shall be paid out of the In-Lunatic.

XXVII. The Masters shall from time to time certify what is the amount of each such clear annual income as aforesaid, and of the percentage payable thereon, and who is the Committee or other person who is to pay the same, and thereupon come of the such Committee or other person as aforesaid shall pay the same out of the first moneys coming to his hands in respect of the income of the Lunatic.

Percentage to be paid notwithstanding death, &c., before paymeut.

XXVIII. The percentage aforesaid, or a proper proportionate part thereof (as the case may require), shall be chargeable and charged upon the estate of a Lunatic, and be payable thereout, although before payment thereof he die, or the Inquisition in his case be superseded, or be vacated and discharged on a Traverse; but in either of the two cases last aforesaid the Lord Chancellor intrusted as aforesaid may, if he see fit, remit or reduce the amount of the sum to be paid; and the payment of the amount in every case shall be enforced in such manner and under such regulations as the Lord Chancellor, with the advice and assistance of the Lords Justices, being intrusted as aforesaid, shall from time to time direct.

1 Vide Supreme Court of Judicature Act (1878) Amendment, 38 & 39 Vict. c. 77, sec. 26.

XXIX. All fees now payable in relation to proceedings in Present Fees Lunacy shall be and the same are hereby abolished, and in abolished, and in and new lieu thereof there shall be paid the following fees only; that Fees substiis to say

18 to say,	•		
For each Order or Fiat of the Lord Chancellor	£	8.	d.
intrusted as aforesaid	2	0	0
For each Report or Certificate of the Masters			
and Taxing Masters respectively (other than			
a certificate of the Masters respecting in-			
come and percentage only)	1	0	0
For attending any Court by the Clerk, per			
diem	1	0	0
And for all engrossments, transcripts, and copies	of	doo	3 u-
ments and papers, the actual amount of the stationer	's ct	arg	çes
paid by the Masters and Registrar respectively for t		_	

XXX. The Lord Chancellor may, with the advice and Power to assistance aforesaid, by Order, from time to time reduce the Lord Chanseveral rates of percentage aforesaid or any of them, and alter peragain, if it shall seem to him expedient, from time to time Fees. raise the same several rates or any of them, but not to rates higher than those respectively hereinbefore prescribed, and also may, with the like advice and assistance, by Order, from time to time vary or abolish the fees aforesaid or any of them, or other the fees for the time being payable in relation to proceedings in Lunacy, or any of them, and, if and when it shall seem to him necessary or expedient, fix and impose other fees, or fees of altered amount.

XXXI. The percentage and the fees for the time being Percentage payable under this Act shall be collected by means of stamps, and Fees to be collected which shall be under the management of the Commissioners by Stamps, of Inland Revenue; and the provisions of the Act of the last and provisions of the Act of the last and provisions of 15 & session of Parliament for "The Relief of the Suitors of the 16 Vict.c.87, High Court of Chancery." respecting stamps, and the moneys Stamps, &c., arising from the sale thereof, shall be and are and every of extended to them is hereby extended so as to be applicable and applied, mutatis mutandis, to stamps to be used under this Act, and the moneys arising from the sale thereof.

XXXII. Where it is made to appear to the Lord Chancel- Power to lor intrusted as aforesaid that the net amount or the net esti- exempt small Propmated value of the property of a Lunatic does not exceed the erties. sum of Seven hundred pounds sterling in respect of the corpus thereof, or a sum of Fifty pounds sterling per annum in

respect of the income thereof, he may order (if he shall think fit) that no fee shall be taken or paid, or percentage be levied or paid, in relation to the proceedings in the matter or the property, as from the date of the order or such other time as he shall direct, during the continuance of the Lunacy or until further order.1

Provisions respecting percentage apply to

XXXIII. All the foregoing provisions respecting fees and percentage shall be applicable to the proceedings in the matter and Fees to of and to the property of a Lunatic under the protection of cases under the Lord Chancellor intrusted as aforesaid by virtue of pro-8 & 9 Vict. ceedings taken under the provisions of the Act of the session certain cases of Parliament holden in the eighth and ninth years of the where Luna-reign of Her Majesty, chapter one hundred, section ninetyjurisdiction. five, and also to the proceedings in the matter of and to the property of a Lunatic under the protection of the Lord Chancellor intrusted as aforesaid by virtue of the transmission of the record of an Inquisition from Ireland, and its entry of record in the Chancery of England, and also to the proceedings in the matter of and to the property of a person residing out of England and Wales, and declared idiot, lunatic, or of unsound mind according to the laws of the place where he is residing, where the Lord Chancellor intrusted as aforesaid makes an order affecting the stock or any portion of the capital stock or shares of such person as last aforesaid, or the dividends thereof; and the aforesaid provisions shall be applied to the several classes of cases mentioned in this present section in such manner and under such regulations as the Lord Chancellor shall, with the advice and assistance aforesaid, from time to time order, but so that no percentage be levied or paid in either of the two last-mentioned cases except in respect of income arising from property being within the jurisdiction of the Lord Chancellor intrusted as aforesaid, and being administered by him or under his authority and direction.

Recital of 3 &4 W. IV. c. 36, imposing a percentage for Visitors of Lunatics.

And whereas the percentage which is now, under the provisions of the Act passed in the session of Parliament holden in the third and fourth years of the reign of King William the Fourth, chapter thirty-six, imposed upon the estates of Lunatics, and paid into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Chancery, to an account entitled "The Account of the Board of Visitors for the Better Care and Treatment of Luna-

¹ Vide 25 & 26 Vict. c. 86, secs. 12–15, post.

tics," will be discontinued under this Act: be it therefore further enacted as follows:—

XXXIV. Every Committee, Receiver, or other person who Sums due is or shall be liable to pay any money in respect of the per- for this percentage last aforesaid shall, notwithstanding this Act, pay be paid. the same into the Bank, in the manner now used, either to the account last aforesaid, or, after it has been closed as hereinaster provided, to the said "Suitors' Fee Fund Account," and be allowed the same on passing his accounts before the Masters.1

XXXV. All salaries and other sums of money payable Salaries, out of the moneys standing to the credit of the "Account of &c., charged on this perthe Board of Visitors for the Better Care and Treatment of centage to Lunatics" shall continue to be payable thereout, until the continue payable account shall be closed as hereinafter is provided, and shall thereout for be paid thereout accordingly in the manner now used.1

a limited

XXXVI. The last-mentioned account shall be closed on Account to the third day of December next after the passing of this Act, be closed, and balance or on such other day as the Lord Chancellor, with the advice carried to and assistance aforesaid, shall order, and the balance which Fund. Suitors' Fee shall then be remaining on the same account shall be carried over to the said "Suitors' Fee Fund Account," under order of the Lord Chancellor.1

XXXVII. The account of moneys received and paid on Account to the "Account of the Board of Visitors for the Better Care be audited. and Treatment of Lunatics," not previously audited, shall, as soon as may be after the closing of the account, be made out by the Secretary to the Visitors, and be audited and signed by the Master in Ordinary of the High Court of Chancery, or other officer to whom the matter of the account shall then stand referred, and shall be afterwards filed with the Registrar in Lunacy, and no fee shall be charged or taken upon, for, or in respect of the auditing or filing thereof.1

And with respect to the Inquisition, be it further enacted Inquisition. as follows: —

XXXVIII. Any Commission in the nature of a Writ de Commis-Lunatico Inquirendo directed to one person or to two per- sions may be directed sons, and the Inquisition returned thereon, shall be as valid to fewer and effectual to all intents and purposes as if directed to and than three

¹ These four clauses are repealed by "the Statute Law Revision Act, 1875," 38 & 39 Vict. c. 66.

persons, and returned by more than two persons; and every Commission shall (subject to the provisions hereinaster contained) be shall be directed to directed to the Masters, or one of them, and may be varied Masters. in form from that now in use in such manner as to the Lord Chancellor may seem necessary or expedient.

General Commission may be issued directed to Masters.

XXXIX. In lieu of the Commission now issued specially in each case of alleged lunacy, a General Commission to the like effect, with such variations as may be necessary or expedient, may from time to time be issued in duplicate under the Great Seal directed to the Masters by name, jointly and severally, who shall by virtue thereof proceed, in each case of alleged lunacy concerning which the Lord Chancellor intrusted as aforesaid shall order them to inquire, in like manner and with all the like powers and authorities (subject to the provisions hereinafter contained) as if a Commission had issued specially in such case, and every Inquisition found and returned thereon shall be as valid and effectual, to all intents and purposes, as if the same had been found and returned on a separate Commission.

Alleged Lunatic, within jurisdiction, to and may dequiry before a jury.

XL. Where the alleged Lunatic is within the jurisdiction, he shall have notice of the presentation of the Petition for Inquiry, and may, by a notice, signed by him, and attested have notice, by his solicitor, and filed with the Registrar, either before the mand an in- presentation of the Petition or within seven days after such notice had by him as aforesaid, or at or within such other time as the Lord Chancellor intrusted as aforesaid shall order in the particular case, demand an inquiry before a jury.2

Where al-Chancellor may examcompetency. jury.

XLI. Where the alleged Lunatic demands an Inquiry leged Luna-tic demands before a jury the Lord Chancellor intrusted as aforesaid shall a jury, Lord in his Order for Inquiry direct the return of a jury, unless he be satisfied, by personal examination of the alleged Lunatic, ine him as to that he is not mentally competent to form and express a wish and order a for an Inquiry before a jury; and the Lord Chancellor intrusted as aforesaid may, where he shall deem it necessary, after presentation of the Petition for Inquiry, and for the purpose of personal examination, require the alleged Lunatic to attend him at such convenient time and place as he may appoint.2

¹ Vide Act 25 & 26 Vict. c. 86, secs. 8-11. See post.

² Vide same.

XLII. Where the alleged Lunatic does not demand an Cases where Inquiry before a jury, or the Lord Chancellor intrusted as a jury may be dispensed aforesaid is satisfied by personal examination of him, that he with. is not mentally competent to form and express a wish in that behalf, and it appears to the Lord Chancellor intrusted as aforesaid, upon consideration of the evidence adduced before him on the Petition for Inquiry, and of the circumstances of the case, so far as they are before him, to be unnecessary or inexpedient that the Inquiry should be before a jury, and he accordingly does not in his Order for Inquiry direct the return of a jury, then the Masters shall, by virtue of their General Commission, and under such Order for Inquiry, but without a jury, personally examine the alleged Lunatic, and take such evidence, upon oath or otherwise, and call for such information, as they may think fit or the Lord Chancellor intrusted as aforesaid may direct, in order to ascertain whether or not the alleged Lunatic is of unsound mind, and shall certify their finding thereon.1

XLIII. Where the Lord Chancellor intrusted as aforesaid, Jury to be under such circumstances as hereinbefore mentioned, does had, if Masnot in his Order for Inquiry, direct the return of a jury, but that it is exthe Masters acting under the Commission, upon consideration of the evidence before them, certify to him, that in their opinion an Inquiry before a jury is expedient, they shall, without further Order, issue their precept to the Sheriff, and shall proceed in like manner in all respects, and their proceedings shall be as valid and effectual, to all intents and purposes, as if the Lord Chancellor intrusted as aforesaid had directed the return of a jury in the first instance.2

XLIV. Where the Masters certify that the alleged Lunatic Certificate is of unsound mind, and incapable of managing himself or his without a affairs, or that he is of unsound mind, and incapable of man-jury to be aging himself or his affairs, and has been so from a time past, Inquisition. or, on the contrary, certify that the alleged Lunatic is of sound mind, and capable of managing himself and his affairs, the certificate shall be and be deemed to be an Inquisition, and be of the same force and effect, to all intents and purposes, and be returned, filed, and proceeded on in the same manner in all respects as an Inquisition taken upon the oath of a jury.

¹ Vide Act 25 & 26 Vict. c. 86, secs. 3-11. See post.

^{*} Vide Act 25 & 26 Vict. c. 86, secs. 3-9, post.

XLV. Where the alleged Lunatic is not within the juris-Jury to be had if Lunadiction, the Inquiry shall be before a jury, and no further or tic out of Jurisdiction, other notice shall be necessary to be given to him than he would have been entitled to receive if this Act had not been passed.1

Lord Chancellor may regulate number of jury.

XLVI. The Lord Chancellor may, from time to time, by Order, regulate the number of jurors to be sworn, but so that every Inquisition upon the oath of a jury be found by the oaths of twelve men, at the least.2

Inquiry not to be carried back except under special Order.

XLVII. The Inquiry, whether with or without a jury, shall, as far as relates to the state of mind of the alleged Lunatic, be confined to the question whether or not the alleged Lunatic is of unsound mind, and incapable of managing himself or his affairs, at the time of the Inquiry, except where the Lord Chancellor intrusted as aforesaid, under special circumstances, shall direct that there be also an Inquiry from what time the alleged Lunatic has been of unsound mind, and incapable of managing himself or his affairs, or shall direct that there be also an Inquiry whether or not the alleged Lunatic was of unsound mind, and incapable of managing himself and his affairs, at a previous time specified and thenceforth down to the time of the Inquiry.2

Commissioner, with jury, to have powers of Judge of Court of Record.

XLVIII. The person executing an Inquiry with a jury shall, while so employed, have all the like powers, authorities, and discretion as a Judge of a Court of Record.

The foregoing provisions pros-

XLIX. The foregoing provisions "with respect to the Inquisition" shall apply only where the Petition for Inquiry pective only. is presented after the commencement of this Act; and every Petition for Inquiry theretofore presented, and on which an Order has not then been made, shall, with respect to the Inquisition, be proceeded on as if this Act had not been passed.8

Nothing to preclude the Lord Chancellor from issuing a mission.

L. Nothing in this Act contained shall be taken to preclude the Lord Chancellor from issuing a Commission specially in any case of alleged Lunacy, or from issuing a Commission Special Com- directed to any fit person or persons, in addition to the Mas-

¹ Vide Act 25 & 26 Vict. c. 86, secs. 3-9, post.

² Vide same Act, sec. 11, as to costs of proceedings.

^{*} Repealed by "the Statute Law Revision Act, 1875," 88 & 39 Vict. **c.** 66.

ters, or one of them, if he shall upon any occasion deem it proper to do so; and the foregoing provisions shall be deemed to extend to every Commission so issued specially, or so directed as aforesaid, so far as they may be applicable.

LI. Where in any Act of Parliament, Order, or Rule of Reference in Court, or Instrument whatsoever, Reference is made to a other Acts to Commis-Commission in the nature of a Writ de Lunatico Inquirendo, sion shall or the Inquisition thereon, the General Commission hereby apply to authorized to be issued, and such Inquisition or Certificate Commission operating as an Inquisition, as is hereby authorized to be thorized to made and returned, shall be deemed to be intended by or be issued. comprehended in the Reference.

LII. Where it is desired that an Inquisition taken on a Inquisition Commission issued under, or a Writ of Supersedeas thereof and Supersedeas may issued under, the Great Seal of the United Kingdom or under be transthe Great Seal of Ireland respectively, should be acted upon and to Irein Ireland or in England respectively, the proper officer may, land and England, under Order of the Lord Chancellor of Great Britain, or the and be acted Lord Chancellor of *Ireland*, as the case may be, transmit a upon there respectively. transcript of the record of the Inquisition, or of the Writ, to the Chancery of Ireland or of England, as the case may be, which transcript shall thereupon be entered and be of record there respectively, and shall, when so entered of record, and if and so long only as the Lord Chancellor of Ireland intrusted as aforesaid, and the Lord Chancellor of Great Britain intrusted as aforesaid, as the case may be, shall see fit, be acted upon by them respectively, and be of the same validity and effect, to all intents and purposes, as if the Inquisition had been taken on a Commission issued under, or the Writ of Supersedeas had been issued under, the Great Seal of Ireland or of the United Kingdom respectively.1

And whereas proceedings under Commission confer larger and more effectual powers for the due protection, care, and management of the persons and estates of persons of unsound mind than proceedings under the Act of the Session of Parliament holden in the eighth and ninth years of the reign of Her Majesty, chapter one hundred, sections ninety-four to ninety-eight (both inclusive), and the expenses of proceedings under Commission will be much diminished by this Act: Be it therefore further enacted as follows:—

¹ Vide Irish Act, 84 Vict. c. 22.

² Vide the several clauses here referred to, post.

Proceeding under 8 & 9 Vict. c. 100. to be discontinued.

LIII. It shall not be lawful for the Lord Chancellor intrusted as aforesaid to direct that one of the Masters shall make such examination as by the ninety-fifth section of the last-mentioned Act is authorized 1 in any case in which a Petition or a Report upon which such direction of the Lord Chancellor intrusted as aforesaid might be founded shall not have been presented or made before the commencement of this Act.

Inquiry may be ordered on Report of Commissioners.

LIV. Where the Commissioners in Lunacy for the time being shall after the commencement of this Act, by virtue of any authority for the time being enabling them in that behalf, report to the Lord Chancellor intrusted as aforesaid that they are of opinion that the property of any person alleged to be a Lunatic, or detained or taken charge of as a Lunatic, but not so found by Inquisition, is not duly protected, or that the income thereof is not duly applied for his benefit, or to the same effect, the Report shall be filed with the Registrar, and shall be deemed and taken to be tantamount to an ordinary Petition for Inquiry supported by evidence, and the alleged Lunatic shall have notice of the Report from such person as the Lord Chancellor intrusted as aforesaid shall from time to time direct, and the case shall proceed and be conducted as nearly as may be in all respects as is hereinbefore directed upon the presentation of a Petition for Inquiry.

Proceedings. after Inquisition.

And with respect to certain of the proceedings after Inquisition be it further enacted as follows:—

Evidence may be oral, &c.

LV. The Masters may direct that the evidence in the matter of a Lunatic or on any particular proceeding in the matter be taken orally, or partly orally and partly by affidavit, and it shall be so taken accordingly.2

Masters cognizances.

LVI. The Masters may, in the matter of a Lunatic or may admin-inter naths alleged Lunatic, administer an oath to any witness, whether and take re- his deposition or affidavit is to be used before themselves or not, and recognizances may be taken and acknowledged before them.2

LVII. The provisions of the Act of the last session of Swearing of affidavits in Parliament, chapter eighty-six, sections twenty-two, twentythe Colonies, three, and twenty-four,* respecting affidavits made in causes OCC.

¹ Vide the several clauses here referred to, post

² Vide 25 & 26 Vict. c. 86, sec. 18, post.

^{* 15 &}amp; 16 Vict. c. 86.

or matters depending in the High Court of Chancery, shall be and the same are hereby extended so as to be applicable, mutatis mutandis, to affidavits made in matters in Lunacy.

LVIII. Every affidavit to be used in a matter in Lunacy Form of affishall be taken and expressed in the first person of the depo-davits. nent, and shall be divided into paragraphs numbered consecutively, and respectively confined, as nearly as may be, to distinct portions of the subject-matter.

LIX. Where an affidavit is required for verifying all or Short Form some of the statements contained in a Petition, state of facts, of Affidavit proposal, or other document, the affidavit may be annexed or tion of underwritten thereto, and may be in the form set forth in the as in Schodthird schedule hereunder written, with such variations as the ule III. circumstances may require; and where the aforesaid form is, in the opinion of the Taxing Master, applicable, no further or greater costs of any affidavit shall be allowed on taxation than would be allowed for an affidavit in the aforesaid form.

LX. Every person giving evidence by affidavit shall be Witnesses liable to oral cross-examination by or before the Masters, in may be cross-examthe same manner as if the evidence given by him in his affi- ined orally. davit had been given by him orally before the Masters, and after cross-examination may be re-examined orally by or on behalf of the person filing the affidavit; and every person giving evidence by affidavit shall be bound to attend before the Masters, to be so cross-examined and re-examined, upon receiving due and proper notice, and payment or tender of his reasonable expenses, in like manner as if he had been duly served with a Writ of Subpæna ad Testificandum before an examiner of the High Court of Chancery; and the expenses attending on such cross-examination and re-exami- How exnation shall be paid in the first instance by the parties re-penses to be spectively, in like manner as if the witness cross-examined were the witness of the party cross-examining, and shall on taxation be ultimately borne and paid by the estate, or the parties respectively, or one of them, as the Lord Chancellor intrusted as aforesaid shall direct.1

LXI. The Masters shall be at liberty to cause to be issued Masters may from time to time such advertisements as may to them seem issue advertisements. expedient with reference to the subject-matter of a proposal or Inquiry.

¹ Vide 25 & 26 Vict. c. 86, sec. 18, post.

Masters to approve of security to be given by Committee of Estate.

LXII. The Masters shall, instead of Her Majesty's Attorney General, approve, on behalf of Her Majesty, of the security to be from time to time given by the Committee of the Estate, under Order of the Lord Chancellor intrusted as aforesaid; and the acts of the Masters with respect to the security and to the grant of the custody shall have the same force and effect to all intents and purposes as the acts of Her Majesty's Attorney General with respect to the same matters now have.

If Her Majesty do not by Her Warrant direct Grant of Custody to be under Great Seal, Order of Lord Chancellor shall have the same effect.

LXIII. In case Her Majesty shall think fit to authorize the Lord Chancellor intrusted as aforesaid to make Orders from time to time for the custody of persons already found or who may hereafter be found idiots or Lunatics as aforesaid, and of their estates, without requiring that any grant or commitment of such custody should be passed under the Great Seal, then any Order to be made by the Lord Chancellor intrusted as aforesaid in pursuance of such authority shall (as to the custody of the person immediately, and as to the custody of the estate upon the Master's Certificate of completion of the Committee's security) have the same force and validity as a grant and commitment of the custody of such idiots or Lunatics and their estates would have had in case the same had been made under the Great Seal, by virtue of any authority for that purpose given by Her Majesty to the Lord Chancellor intrusted as aforesaid, and the provisions of this Act respecting the grant shall be deemed to extend to any Order to be made as aforesaid.

Masters
may authorize payment
or transfer
into Court of
money or
stock as
security for
Committee.

LXIV. Where it is desired and the Masters allow that the approved Committee of the Estate should, in lieu of giving security in the manner now usual by bond or recognizance with sureties, give security, in the whole or in part, by bringing into Court an adequate sum of money or stock, the Masters may by Certificate direct or give liberty for the payment into the Bank of England, with the privity of the Accountant General of the Court of Chancery, to the Credit of the matter of the Lunatic, of any sum of money, or the transfer into the name and with the privity of the said Accountant General, in trust in the matter of the Lunatic, of any sum of stock, and may specify the account to which the sum of money or stock is to be placed, and may direct how any money is to be invested, or how any dividends are to be applied, and such payment, transfer, investment, and application, as the case may require, shall be made by virtue of such Certificate,

and the said Accountant General shall declare the trust of the sum of money or stock when so paid or transferred accordingly, subject to the Order of the Lord Chancellor intrusted as aforesaid.

LXV. Where it appears expedient, either with a view to Masters the reduction of the amount of the security of the Committee may receive and deliver of the Estate, or for any other reason, the Masters may with- out Deeds, out Order receive or deliver out any deed or security belong- &c., of Luing to the Lunatic, and may by Certificate direct or give authorize liberty for the payment into the Bank of England, with the payment or privity of the Accountant General of the Court of Chancery, Court of money or to the credit of the matter of the Lunatic, of any sum of stock bemoney belonging to the Lunatic, or the transfer into the name longing to Lunatic. and with the privity of the said Accountant General, in trust in the matter of the Lunatic, of any sum of stock belonging to the Lunatic, and such payment or transfer, as the case may require, shall be made by virtue of such Certificate, and the said Accountant General shall declare the trust of the sum of money or stock when so paid or transferred accordingly, subject to the Order of the Lord Chancellor intrusted as aforesaid.

LXVI. Where the Masters find and report that several Grant of persons are the most fit persons to be appointed the Com- custody may mittees of the Estate or of the Person, and they are of opin- to surviving ion that it is expedient that one or more of the same several ing Commitpersons should continue to be the Committee or Committees tees in cerafter the death or discharge of the others or other of them, and such persons are willing so to continue, the Masters may report accordingly; and where the Report is confirmed the approved Committees of the Estate may perfect their securities in such form as to extend to the acts and defaults of one or more of them, in accordance with the Report, and thereupon the grant of the custody of the estate or of the person (as the case may be) shall be made conformably with the Order of custody; and the continuing or surviving Committee or Committees to whom separately the grant extends shall and may continue until further Order to act after the death or discharge of the others or other of them, with all the like powers, authorities, and discretions, and subject to all the like liabilities, as the original Committees.

LXVII. The Master's allowance of the account of a Com- Form of Almittee for 1 Receiver shall be signified under their hands and lowance of Accounts.

be written under the account, but no Certificate shall be made, except where it may be specially required with a view to payment of money into Court or for some other purpose.

Masters to distinguish items in account which they cannot allow, and the account to be submitted to Lord Chancellor.

LXVIII. Where the Masters are of opinion that any small expenses included in the Committee's or Receiver's account have been properly and reasonably incurred for the benefit or enjoyment of the Lunatic, or the improvement, security, or advantage of his estate, and there is no opposition to the allowance thereof, but it may not be competent to them to allow the same to the Committee or Receiver without the sanction of the Lord Chancellor intrusted as aforesaid, they shall distinguish the items by some mark in their allowance of the account, which shall be made subject to the approval of the Lord Chancellor intrusted as aforesaid, and the account as passed by the Masters shall be submitted by them to the Lord Chancellor, without Petition, for his allowance or disallowance in respect of the items so distinguished by them.

Masters to receive proposals in certain **Cases.**

LXIX. The Masters shall be at liberty, without an Order of Reference; to receive any proposal, and conduct any inquiry, respecting the managing, repairing, setting, or letting of the estate, and to report thereon.

Masters may receive proposals in

LXX. The Masters shall also be at liberty, without an Order of Reference, to receive any proposal and conduct any other cases. Inquiry relating to the estate, not respecting the managing. repairing, setting or letting hereof,1 and any proposal or Inquiry whatsoever relating to the person, and to report thereon respectively, if and when they shall be of opinion that if application were made to the Lord Chancellor intrusted as aforesaid concerning the matter of any such proposal or Inquiry a Reference thereon would be made to the Masters.

Persons objecting to Masters reposal may apply to Lord Chancellor.

LXXI. Where the Masters, without an Order of Reference, receive any proposal or proceed in any Inquiry relating ceiving pro- to the estate, not respecting the managing, repairing, setting, or letting thereof, or any proposal or Inquiry whatsoever respecting the person, any person attending before them shall be at liberty to apply by Petition to the Lord Chancellor intrusted as aforesaid, as he may be advised; and thereupon the Masters shall, pending the application, cease from proceeding on the proposal or in the Inquiry, unless the Lord Chancellor intrusted as aforesaid otherwise direct.

1 thereof.

LXXII. Where the Masters, without an Order of Refer-Masters may ence, receive and proceed on a proposal or conduct an In-certify as to quiry, but arrive at the opinion that the proposal ought not proposal to be adopted and carried into effect, or that the Inquiry was with regard to be adopted and carried into effect, or that the Inquiry was with regard unnecessary, they shall be at liberty to certify whether or not, regard being had to the circumstances, the proposal or Inquiry was proper to be made; and if they certify in the affirmative, usual and proper costs of the proposal or Inquiry and proceedings thereon shall be allowed on taxation by virtue of their Certificate, but if they certify in the negative, the Lord Chancellor intrusted as aforesaid shall direct by whom and in what manner the costs shall be paid and borne.

LXXIII. Where any person requires that the Masters Persons inshould report on a proposal which they have received and sisting on Reportliable proceeded on without an Order of Reference, notwithstand- to costs. ing their opinion that it should not be adopted and carried into effect, the Masters shall report on the proposal, and the Report shall be brought before the Lord Chancellor intrusted as aforesaid by Petition, who shall make such Order upon the Report and respecting the costs as to him shall under the circumstances seem just.

LXXIV. Where an application is made by Petition to the On applica-Lord Chancellor intrusted as aforesaid, either concerning a tion not being made matter which might have been brought before the Masters in to Masters, the first instance, or in consequence of the Masters receiving costs may be ordered to any proposal or proceeding in any Inquiry relating to the be paid. estate or the person, the Lord Chancellor intrusted as aforesaid may make such Order respecting the costs of the application and of the consequent proceedings as to him shall, under the circumstances, seem just.1

LXXV. Subject to the provisions hereinafter contained, Masters to the Masters shall, as soon as may be after the return of the inquire as to Inquisition, and may afterwards from time to time as they and they are may think it expedient, inquire and certify who are the next tice of proof kin, and, subject to the provisions hereinafter contained, ceedings. due notice of attending on the proceedings in the matter shall be given to the persons for the time being found to be the next of kin.

As to costs, see also 25 & 26 Vict. c. 86, sec. 11, post.

No Inquiry kin where empted from fees.

LXXVI. Where the Lord Chancellor intrusted as aforesaid as to next of by virtue of the power hereinbefore given, exempts the propproperty ex- erty of a Lunatic from payment of fees and percentage, the Master shall not during the continuance of the exemption inquire respecting his next of kin, without special Order.

Lord Chancellor may dispense Inquiry as to next of kin.

LXXVII. The Lord Chancellor intrusted as aforesaid may in any case by Order defer an Inquiry respecting next of kin, with or limit or direct that the Inquiry shall be carried on to such limited extent only, and under such restrictions and provisions, and in such manner, as he may, under the circumstances of the case, think expedient, and may, where he deems it just and expedient, order that persons alleging themselves to be next of kin be left to make out their claim at their own expense, and may in any case, if from the smallness of the property of the Lunatic (although it be not such as to entitle it to exemption from payment of fees and percentage), he think it safe and just, by Order wholly dispense with the Inquiry.

Masters to report where Inquiry as to next of kin inexpedient.

LXXVIII. Where the Masters are of opinion that by reason of the smallness of the property of a Lunatic or for any other reason an Inquiry or a subsequent Inquiry (as the case may be) respecting next of kin should be dispensed with or deferred, or be carried on to a limited extent only, they shall report accordingly.

Masters may dispense with strict proof of pedigree in certain cases.

LXXIX. Where the Masters, in conducting an Inquiry respecting next of kin, without any special direction of the Lord Chancellor intrusted as aforesaid concerning the mode of conducting the same, are of opinion that the circumstances of the case render it expedient and safe that strict proof of pedigree should not be gone into, they may dispense with the same to such extent and in such manner as may to them seem expedient, and may require and receive such evidence as may appear to them sufficient and satisfactory respecting the family and the next of kin, and shall certify the mode in which they have conducted the Inquiry.

Lord Chancellor may dispense with attendance of next of kin.

LXXX. The Lord Chancellor intrusted as aforesaid may, by Order, dispense with and disallow the attendance on the proceedings in the matter of all or some of the next of kin either wholly, or except at their own expense, or except upon special leave first obtained, as he shall under the circumstances think expedient; and such notice only of attending on the proceedings shall be given as shall be conformable with the Order of the Lord Chancellor intrusted as aforesaid.

LXXXI. Subject to the provisions hereinbefore contained, Masters to the Masters shall once in the matter of each Lunatic, and may determine which of afterwards from time to time as they think it expedient, de-next of kin termine whether any one or more, and if any, how many and to attend before them, which, of the next of kin is or are to attend on the proceed- and to cerings or on any particular proceeding before them in the matter same only to (but exclusively, as at present, of the heir at law, with attend before Lord respect to notice of or attendance on the account of the Com-Chancellor. mittee of the Estate), and the person or persons alone (if any) to whom the Masters have given liberty to attend, shall be entitled to notice of or shall be allowed to attend, at the cost of the estate, on any proceeding, or on such particular proceeding as aforesaid (as the case may be), before the Masters, except upon their special leave first obtained; and the same person or persons alone (if any) to whom the Masters have given liberty to attend on the proceedings before them in the matter generally shall be entitled to notice of or shall be allowed to attend, at the cost of the estate, on any proceeding before the Lord Chancellor intrusted as aforesaid, except upon his special leave first obtained, and for that purpose the Masters shall, from time to time as occasion may require, certify who is or are the person or persons (if any) to whom they have given liberty to attend on the proceedings before them in the matter generally.

LXXXII. Where an infant, being one of the next of kin, Masters and being at liberty to attend on the proceedings, has no may appoint guardian, the Masters may from time to time, by Certificate, for Lunacy. appoint a fit person to be his guardian for the purposes of the Lunacy, who shall thereupon, for the purposes of the Lunacy only, and not further or otherwise, have all the same powers, authorities, and discretion as if he had been duly constituted guardian by the Court of Chancery; and the Masters may, from time to time, by Certificate, revoke any such appointment, and appoint another fit person to be the guardian, toties quoties.

LXXXIII. The Masters may, where it seems expedient, In cases of consolidate or carry on together similar proceedings before members of same famthem in the matters of several persons being members of the ily, proceedsame family, and may in that case and also where it does not ings may be

consolidated, and evidence in-

seem expedient that the proceedings should be consolidated or carried on together, use in the matter of one member of a terchanged. family evidence filed or taken in the matter of another member or other members of the same family, when and so far as it may be applicable.

Masters may open and deliver out Will.

LXXXIV. The Masters may, on being satisfied of a Lunatic's death, without Order, open and read any paper writing deposited with them, and purporting or alleged to be his Will, for the purpose of ascertaining who is therein nominated executor thereof, and also whether or not there is any and what direction therein contained concerning his funeral or place of interment, and then deliver the same to the Registrar or other proper officer of the Prerogative or other proper Ecclesiastical Court, to the intent that the same may be exhibited in the usual course, and dealt with according to law, and shall certify the death, and the opening and delivering out of the paper writing accordingly.

Masters may inquire respecting interest in stock of Lunatic residing out of jurisdiction.

LXXXV. The Masters shall be at liberty, without Order of Reference, to inquire and report whether or not any person residing out of *England* and *Wales*, and where, has been declared idiot, Lunatic, or of unsound mind, and whether or not his personal estate, or some and what part thereof, has been vested in a curator, or other and what person appointed for the management thereof, according to the laws of the place where the person is residing, and whether or not any and what stock, portion of the capital stock, or share of any and what company or society, is standing in the name of or is vested in that person, and what is his interest therein.

Masters may direct times, &c. of proceeding before them.

LXXXVI. Subject to the provisions of this Act, and to the General Orders in Lunacy for the time being in force, and to any Order of the Lord Chancellor intrusted as aforesaid, the Masters may, if they think fit, dispense with any summons ordinarily taken out in the course of the proceedings before them, and direct and require any party attending before them to take out a summons for a particular purpose or within a particular time, and fix the time at which any particular summons shall be returnable before them, or at or within which any proceeding necessary or proper to be taken before them shall be taken, and may proceed de die in diem or adjourn the proceedings before them, as they may see fit.

LXXXVII. The Masters shall from time to time inquire Masters to into the circumstances of any delay in the conduct of pro- inquire into delays. ceedings before them, or in proceeding upon their Reports, Certificates, or Decisions, and for that purpose may call before them all parties concerned, and may report accordingly, where it seems expedient.

LXXXVIII. The Masters may, by Certificate, disallow, Masters wholly or in part, the costs of any proceeding or document may distaken or used or proposed to be taken or used before them; and the costs of the attendance of Counsel before them shall not be allowed on taxation, unless they certify that such attendance was proper, and for the security or advantage of the Lunatic or his estate.

LXXXIX. The affidavits, petitions, and other documents Documents brought into the offices of the Masters or Registrar shall not unnecessary contain unnecessary recitals or statements of proceedings or length. documents previously taken or used in the matter; and the Taxing Master shall look into all such affidavits, Petitions, and other documents as aforesaid, and deal in such manner as to them seems just with the costs of any affidavit, Petition, or other document appearing to them to be unnecessary or improper, in the whole or in part, or of unnecessary length.

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XC. The Masters shall be at liberty to report specially to Masters the Lord Chancellor intrusted as aforesaid any decision at may report which they may arrive, or any other matter relating to any pending In-Inquiry or proposal pending before or under consideration by quiry. them, in order to obtain a decision or direction by or from him for their guidance in the further prosecution of the inquiry or consideration of the proposal.

XCI. The Masters' Reports shall be divided into para- Form of graphs, numbered consecutively, and respectively confined, Reports as nearly as may be, to distinct portions of the subject-matter, and with such appropriate headings prefixed to all or any of the paragraphs as may be convenient.

XCII. The Reports of the Masters, whether confirmed by Reports to Fiat or not, under the provisions hereinafter contained, and be filed with Registrar in their Certificates, and all other Reports and Certificates made Lunacy in matters in Lunacy (except the Reports of the Visitors only. hereinaster provided for), shall be left by the Masters, Taxing Masters, and other officers making the same respectively, with the Registrar in Lunacy, by whom the same shall be

filed, and it shall not be necessary that they or any of them should be filed elsewhere; and the Accountant-General of the Court of Chancery, and all other persons, and the Governor and Company of the Bank of England, shall, as occasion may require, act upon or in relation to any Report, and the Fiat thereon (if any), or any Certificate so filed, in like manner as if the Report or Certificate had been filed also in the Report Office of the Court of Chancery, according to the practice formerly used.

Objections to Report may be brought in.

XCIII. Any person objecting to a draft Report of the Masters, and desiring to prosecute the objection, shall bring in before the Masters a statement of objections in writing. and thereupon the Masters shall be at liberty to review the draft objected to; and after review, or the refusal of the Masters to review, the person objecting may bring in before the Masters a notice in writing, stating that he insists on the objections or any one or more of them; and all the objections not so insisted on shall be considered as abandoned.

No Petition firmation, but objections to be brought fortition for Confirmation.

XCIV. No person shall, except upon special leave of the against Con- Lord Chancellor intrusted as aforesaid first obtained, present a Petition against the confirmation of a Report, but in every case, on the hearing of the Petition for confirmation of the ward on Pe- Report, any objections insisted on as aforesaid may be brought forward in opposition to the confirmation of the Report, without any exceptions or cross Petition.

Reports not objected to may be conout Petition.

XCV. Where no statement of objections is brought in, or all the objections contained in a statement brought in are firmed with- abandoned, the Report shall be submitted to the Lord Chancellor intrusted as aforesaid for confirmation, without Petition, and without the attendance of parties, except where from the special nature or circumstances of the case the Masters are of opinion that the Report ought to be brought before the Lord Chancellor intrusted as aforesaid by Petition and by endorsement on the Report under their hands shall so direct accordingly.

Such Reports to contain consequential Directions, and Fiat of Lord Chan-

XCVI. Where a Report is to be submitted for confirmation without Petition it shall contain the directions consequential on the confirmation thereof, and the Fiat of the Lord Chancellor intrusted as aforesaid on the Report shall give it the operation of an Order of the Lord Chancellor intrusted as aforesaid made upon Petition, subject to such other directions celler to give and provisions (if any) as the Lord Chancellor intrusted as them operaaforesaid may think fit.

Ordera.

XCVII. The Reports of the Masters shall be brought Cases in before the Lord Chancellor intrusted as aforesaid for confir-which Remation, by Petition, in each of the cases following: —

ports shall not be con-

- 1. Where the Lord Chancellor intrusted as aforesaid, on without Petition. referring a matter to the Masters to inquire and report, so directs;
- 2. Where a statement of objections is brought in, and all the objections are not abandoned;
- 3. Where the Masters, having regard to the special nature or circumstances of the case, as hereinbefore provided, so direct;
- 4. Where no Order is made on the Report being submitted for confirmation without Petition;

And in such other cases as are herein mentioned, and as the Lord Chancellor, with the advice and assistance aforesaid, shall from time to time by General Order direct.

And with respect to Orders in Lunacy, be it further Orders. enacted as follows:—

XCVIII. Every Petition shall be filed before an Order Form of thereon shall be passed, and the Order shall not recite any Orders. part of the statements contained in the Petition, and only such part (if any) of the prayer as may be necessary, and an Order shall not state any part of a Report, except the Master's conclusion or opinion, or so much thereof as may be necessary; and the Lord Chancellor, with the advice and assistance aforesaid, may and shall from time to time make such General Orders as to him shall seem meet for embodying (as far as may be) such provisions and directions as are now commonly or frequently inserted in Orders, and are not provided for by this Act, and for dispensing (as far as may be) with the formal parts of Orders as now drawn up.

XCIX. Every Order of the Lord Chancellor intrusted as Orders to be aforesaid in a matter in Lunacy shall be communicated by communicated by cated to the Registrar to the Masters, whether any matter is thereby Masters. referred to them or not.

C. Every Order made in a matter in Lunacy by the Lord Orders to be Chancellor intrusted as aforesaid when drawn up by the Regis- entered by

trar, and office copies to be furnished and signed by him.

trar in Lunacy and signed by the Lord Chancellor intrusted as aforesaid shall be entered by the Registrar in Lunacy in a proper book to be provided by him for that purpose, and he shall furnish office copies of any Order or of any Report, confirmed by Fiat, or of any part thereof respectively, signed by him, and sealed or stamped with the seal of his office, to every party in the matter or other person entitled thereto who shall require the same; and every office copy of the whole of an Order or Report confirmed as aforesaid, purporting to be so signed and sealed or stamped with such seal, shall at all times, and on behalf of all persons, and whether for the purposes of this Act or otherwise, be admitted as evidence of the Order or Report confirmed as aforesaid of which it purports to be a copy, without any further proof thereof.1

Money Orders to be acted upon ant-General as if drawn up by the Registrar of Chancery.

CI. Where an Order or a Report confirmed by Fiat relates to the payment, transfer, carrying over, or depositing of any by Account- cash, stock, funds, annuities, securities, or other effects, to or into the name of, or in the custody of the Accountant-General of the Court of Chancery, to the credit of the matter the Court of of a Lunatic, or to the payment, transfer, or carrying over or other disposal by the said Accountant-General of any cash, stocks, funds, annuities, securities, or other effects standing in his name or deposited in his custody to the credit of the matter of a Lunatic, or of any cash, stocks, funds, annuities, securities, or other effects to or in which a Lunatic is entitled or beneficially interested, and which are not standing in trust in a cause or matter depending in the Court of Chancery, the said Accountant-General and all other persons, and the Governor and Company of the Bank of England, shall act upon the Order signed by the Lord Chancellor intrusted as aforesaid, after the same has been entered as hereinbefore provided, or upon an office copy of the Report confirmed by Fiat, and thence receiving the operation of an Order after the same has been filed as hereinbefore provided, in the same manner as if an Order had been drawn up by the Registrar of the Court of Chancery, and passed and entered in the Court of Chancery according to the practice formerly used; Registrar to and the Registrar in Lunacy, in case of an Order, and the Masters in case of a Report confirmed by Fiat, shall certify under their hands respectively to the said Accountant-General what stocks, funds, annuities, securities, or other effects are by virtue of any such Order or Report confirmed as aforesaid

certify to Accountant-General.

1 Vide 25 & 26 Vict. c. 86, sec. 29, post.

(as the case may be) to be sold, transferred, or delivered out, in the same manner as the Registrars of the Court of Chancery were formerly accustomed to do.1

CII. If any person shall forge the signature of the Regis- Persons trar in Lunacy, or shall forge or counterfeit the seal of his signature or office, or knowingly concur in using any such forged or coun- seal of the terfeited signature or seal, or shall tender in evidence any Registrar document with a false or counterfeit signature of such Regis-felony. trar, or with a false or counterfeit seal, knowing the same signature or seal to be false or counterfeit, every such person shall be guilty of felony, and shall be liable to the same punishment as any offender under an Act of the session of Parliament holden in the eighth and ninth years of the reign of Her Majesty, chapter one hundred and thirteen.

CIII. The foregoing provisions, "with respect to certain These proof the proceedings after Inquisition," and "with respect to visions to apply to Orders," shall be applicable and applied, as far as may cases under be, to the proceedings in the matters of Lunatics under the 8 & 9 Vict. c. 100, s. 95. protection of the Lord Chancellor intrusted as aforesaid, by virtue of proceedings taken under the Act of the session of Parliament holden in the eighth and ninth years of the reign of Her Majesty, chapter one hundred, section ninety-five.

And with respect to the visiting of Lunatics be it further Visiting. enacted as follows:2

CIV. Each Lunatic shall be personally visited and seen Lunatics to by one at the least of the Visitors, according to the provisions be visited at least once of the next following section, once at the least in each year, a year. or oftener, and at such times as the Lord Chancellor intrusted as aforesaid may direct, or, in the absence of his directions, as the Board of Visitors may think expedient.*

CV. The Medical Visitors shall continue to visit Lunatics Medical as at present, and the Legal Visitors to be appointed after Visitors and future Legal the commencement of this Act, shall also respectively visit Visitors to Lunatics; and the visits of the several Visitors shall be from visit either or time to time regulated as the Lord Chancellor intrusted as in succesaforesaid may direct, or, in the absence of his directions, as

¹ Vide 25 & 26 Vict. c. 86, sec. 29, post.

² Vide 25 & 26 Vict. c. 86, secs. 19-22, post, relative to visiting Lunatics, and the duties of the Visitors.

^{*} This section is repealed by sec. 22 of the Act above referred to.

the Board of Visitors may deem necessary or advisable, in such manner that, as far as circumstances will admit, every Lunatic may from time to time and in due succession, be visited by the Legal Visitor, either alone or in company with one of the Medical Visitors.¹

Visitors to report to Lord Chancellor.

CVI. The Visitors shall respectively, within a convenient time after each visit, make a Report in writing to the Lord Chancellor intrusted as aforesaid of the state of mind and bodily health and of the general condition, and also of the care and treatment of each person visited and seen by them respectively, which Reports shall, annually or oftener, as the Lord Chancellor intrusted as aforesaid may direct, or the Board of Visitors may think expedient, be submitted to the Lord Chancellor intrusted as aforesaid; and the Visitors respectively shall make separate or special Reports on any case to the Lord Chancellor intrusted as aforesaid as and when they or the Board of Visitors may think expedient, and in particular shall report to him, without delay, any instance in which they respectively, on proceeding to visit, have been unable to discover the then residence of or have been by any other circumstance prevented from actually seeing on that occasion the Lunatic whom they intended to visit.

Visitors' Reports to be kept secret, and destroyed on death, &c.

CVII. The Reports of the Visitors shall be filed and kept secret in their office, and shall be open to the inspection of no person save the members of the Board of Visitors, their secretary, and his clerk, and the Lord Chancellor intrusted as aforesaid, and such persons as he may specially appoint; and all the Reports relating to any particular patient shall be destroyed on the death of the patient, and shall also be destroyed on the Inquisition in his case being superseded, or being vacated and discharged on a Traverse, unless the Lord Chancellor intrusted as aforesaid, within fourteen days after the Supersedeas, or the vacating and discharge on a Traverse, specially order that the same be not destroyed until the death.

Management and
Administra- of the estates of Lunatics, be it further enacted as follows:
tion of
Estate.

CVIII. Where a Lunatic is entitled to be admitted tenant to appear and take admittance to at one of the three next courts holden for the Manor (for the

¹ This section is repealed by Act 25 & 26 Vict. c. 86, sec. 22, post.

holding whereof the usual notice shall be given), and there copyholds. offer himself to be admitted tenant in the name and on behalf In default, of the Lunatic; and in default of his appearance, or of his appoint Atacceptance of admittance, the Lord or his steward may, after torney to take admit-. three courts duly holden, and proclamations thereat regularly tance. made, at any subsequent court appoint any fit person to be Attorney for the Lunatic for that purpose only, and by that Attorney admit the Lunatic tenant of the land, according to such estate as the Lunatic shall be legally entitled to therein.

CIX. The Lord or his steward may upon the admittance Fine upon impose such fine as might have been legally imposed if the Admittance may be im-Lunatic had been of sound mind, which fine may be demanded posed and by the Lord's bailiff or agent, by a note in writing signed by demanded. the Lord or his steward, to be left with the Committee of the Estate, or with the tenant or occupier of the land.

CX. If the fine be not paid or tendered to the Lord or his If not paid. steward within three months after demand, then the Lord &c., Lord may enter may enter upon and hold the land, and receive the rents and and receive profits thereof (but without liberty to fell any timber standing the Copythereon), until he be thereby fully paid the fine, with his hold till he reasonable costs and charges of raising the same and of &c. obtaining the possession of the land, although the Lunatic die before the fine and costs and charges have been raised; of which rents and profits received by the Lord, his steward, bailiff, or servant, the Lord shall yearly, on demand by the Lord to person entitled to the surplus thereof, after payment of the account fine and costs and charges, or by the person then entitled to the land, render a just and true account, and shall pay the same surplus, if any, to the person entitled thereto; and as soon as the fine and costs and charges have been fully paid, or if, after the Lord's entry, the fine and costs and charges be lawfully tendered to him, then the Lunatic, by the Committee of his Estate or other the person entitled, may enter upon and hold the land, according to his estate or interest therein; and the Lord shall deliver possession thereof accord- And to deingly, and if he refuse so to do he shall make satisfaction to liver up posthe person kept out of possession for all the damages which satisfaction. he shall thereby sustain, and all his costs and charges of recovering possession.

CXI. If the Committee pay the fine and costs and charges, Committee then he, his executors and administrators, may enter upon paying Fine and hold the land, and receive the rents and profits thereof burns himto his and their own use, until he and they be thereby fully Rents.

paid the amount disbursed upon that account, although the Lunatic die before his and their reimbursement.

Unlawful Fines may be controforfeiture for not appearing or not paying Fine.

CXII. If the fine imposed be not warranted by the custom of the manor, or be unlawful, the Lunatic may controverted. No vert its legality, as if this Act had not been made; and no Lunatic shall forfeit any land for his neglect or refusal to appear at any court, or to be admitted thereto, or to pay the fine imposed upon his admittance.

Committee may surrender Lease. and accept Renewal.

CXIII. Where a Lunatic is entitled to a lease for a life or lives or for a term of years, either absolute or determinable on a death, or otherwise, the Committee of his Estate may, in his name and on his behalf, under an Order of the Lord Chancellor intrusted as aforesaid, by deed surrender the lease, and in the name and on behalf and for the benefit of the Lunatic accept a new lease of the premises comprised in the lease surrendered, for such number of lives, or for such term of years, either absolute or determinable as aforesaid, as was mentioned or contained in the lease surrendered at the making thereof, or otherwise as the Lord Chancellor intrusted as aforesaid shall order.

Charges of Renewal to be charged on Estates.

CXIV. Every sum of money and other consideration paid by a Committee or other person, in the nature of or as a fine, premium, or income upon renewal, and all reasonable charges incident thereto, may be paid out of the Lunatic's estate, or may, with interest, be a charge upon the leasehold premises, as the Lord Chancellor intrusted as aforesaid shall order.

New Leases to be to the same uses.

CXV. Every lease renewed shall operate and be to the same uses, and be liable to the same trusts. charges, incumbrances, dispositions, devises, and conditions, as the lease surrendered was subject to, or would have been subject to if the surrender had not been made.

Lunatic's property mortgaged, &c., for tenance, &c.

CXVI. Where it appears to the Lord Chancellor intrusted may be sold, as aforesaid to be just and reasonable, or for the Lunatic's benefit, he may order that any estate or interest of the Lunadebts, main- tic in land or stock, either in possession, reversion, remainder, contingency, or expectancy, be sold, or charged by way of mortgage, or otherwise disposed of, as may to him seem most expedient, for the purpose of raising money to be applied, and may accordingly order that the money when raised be applied, for or towards all or any of the purposes following:

- 1. The payment of the Lunatic's debts or engagements;
- 2. The discharge of any incumbrance on his estates;
- 3. The payment of any debt or expenditure incurred or made after Inquisition, or authorized by the Lord Chancellor intrusted as aforesaid to be incurred or made, for the Lunatic's maintenance or otherwise for his benefit;
- 4. The payment of or provision for the expenses of his future maintenance;
- 5. The payment of the costs of applying for, obtaining, and executing the Inquiry, and of opposing the same;
- 6. The payment of the costs of any proceeding under or consequent on the Inquisition, or incurred under Order of the Lord Chancellor intrusted as aforesaid; and
- 7. The payment of the costs of any such sale, mortgage, charge, or other disposition as is hereby authorized to be made:

And the Committee of the Estate may and shall, in the name and on behalf of the Lunatic, execute, make, and do all such conveyances, deeds, transfers, and things relative to any such sale, mortgage, charge, or other disposition as aforesaid, and for effectuating this present provision, as the Lord Chancellor intrusted as aforesaid shall order.1

CXVII. In case of a charge or mortgage being made under Modes in this Act upon an interest in contingency, or in reversion, re- which future maintenance mainder, or expectancy, for the expenses of future mainten- may be ance, the Lord Chancellor intrusted as aforesaid may direct charged when Interthe same to be payable and paid either contingently, if the est not in interest charged be a contingent one, or upon the happening of the event, if the interest be depending on an event which must happen, and either in a gross sum or in annual or other periodical sums, and at such times, in such manner, and either with or without interest, as he shall deem expedient; and any charge already made which would have been valid if made after this Act shall be and is hereby declared to be valid.

CXVIII. Where it appears to the Lord Chancellor in-Expenses of trusted as aforesaid to be for the Lunatic's benefit, he may Improvements may order that the whole or any part of any moneys expended or be charged to be expended under his Order for the permanent improve- on Estate. ment, security, or advantage of the land of the Lunatic or of any particular part thereof, shall with interest, be a charge

¹ Vide 25 & 26 Vict. c. 86, secs. 11, 16, and 17, post.

upon and be raisable out of the Lunatic's estate and interest in the land or such particular part thereof as aforesaid, but so that no right of sale or foreclosure during the lifetime of the Lunatic be given or acquired under or by virtue of the charge; and the interest shall be kept down during the Lunatic's lifetime, out of the income of his general estate, as far as the same shall be sufficient to bear it; and the Committee of the Estate may and shall, in the name and on behalf of the Lunatic, execute and do all such conveyances and things for effectuating this present provision as the Lord Chancellor intrusted as aforesaid shall order; and such charge may be made either to some person advancing the money, or if the money is paid out of the Lunatic's general property, to some person as a trustee for him, as part of his personal estate.

Surplus of moneys to be of the same nature as the Estate.

CXIX. On any moneys being raised by sale, mortgage, charge, or other disposition of land made in pursuance of any of the foregoing provisions, the person whose estate is sold, mortgaged, charged, or otherwise disposed of, and his heirs, next of kin, devisees, legatees, executors, administrators, and assigns, shall have such and the like interest in the surplus moneys remaining after the purposes for which the moneys have been raised shall have been answered as he or they would have had in the estate if no sale, mortgage, charge, or other disposition thereof had been made, and the surplus moneys shall be of the same nature and character as the estate sold, mortgaged, charged, or otherwise disposed of; and the Lord Chancellor intrusted as aforesaid may make such Orders, and direct such conveyances, deeds, and things to be executed and done (which may and shall accordingly be executed and done), as may be necessary for the effectuating this present provision, and for the due application of the surplus moneys.

Where property very small, Lord Chancellor may apply same directly for Lunatic's maintenance without Grant, &c.

CXX. Where it is made to appear to the Lord Chancellor intrusted as aforesaid that the net amount or net estimated value of the property of a Lunatic does not exceed the sum of Five hundred pounds sterling, and it appears to him, having regard to the situation and condition in life of the Lunatic and his family, and the other circumstances of the case, to be expedient that the amount or value of his property should be made available for his maintenance in a direct and inexpensive manner, and that the same can be safely and properly done, he may, instead of proceeding to order a grant of

the custody of the estate, order or allow that the amount of the property, if in money or stock, or if of any other description the produce thereof when realized, be paid or transferred to such relative of the Lunatic, or such other person as he may think proper to intrust with the application thereof, to be by him applied in or towards the maintenance of the Lunatic, either at his discretion or in such manner and subject to such control as the Lord Chancellor intrusted as aforesaid may direct; and for the purpose of giving effect to any such Order, the Lord Chancellor intrusted as aforesaid may order any small real estate or other property of the Lunatic to be sold, and a valid conveyance or transfer thereof to be executed or made by such person as he shall direct.1

CXXI. Where it appears to the Lord Chancellor intrusted Where luas aforesaid, upon a Report of the Masters, that there is nacy temporary.Lord reason to believe that the unsoundness of mind of any Luna-Chancellor tic so found by Inquisition is in its nature temporary, and Cash arising will probably be soon removed, and that it is expedient that from Income temporary provision should be made for the maintenance of rary maintethe Lunatic, or of the Lunatic and the members of his imme- nance, withdiate family who are dependent upon him for maintenance, &c. and that any sum of money arising from or being in the nature of income or of ready money belonging to the Lunatic, and standing to his account with a banker or agent, or being in the hands of any person for his use, is readily available and may be safely and properly applied in that behalf, the Lord Chancellor intrusted as aforesaid may allow thereout such amount as he may think proper for the temporary maintenance of the Lunatic, or of the Lunatic and the members of his immediate family who are dependent upon him for maintenance, and may, instead of proceeding to order a grant of the custody of the estate, order or give liberty for the payment of any such sum of money as aforesaid, or any part thereof, to such person as he may, under the circumstances of the case, think proper to intrust with the application thereof, and may direct the same to be paid to such person accordingly, and when received to be applied, and the same shall accordingly be applied, in or towards such temporary maintenance as aforesaid; and the receipts in writing of the person named in the Order to whom payment is to be made for any moneys payable to him by virtue thereof shall effectually discharge the banker, agent, or other person paying

¹ Vide 25 & 26 Vict. c. 86, secs. 12-15, post.

the same from the moneys therein respectively expressed to be received, and they respectively are hereby directed to act upon and obey every such Order; and the person so receiving any moneys by virtue of this present provision shall pass an account thereof before the Masters when required.

Committee Contracts.

CXXII. Where a person having contracted to sell, mortmay convey gage, let, divide, exchange, or otherwise dispose of any land formance of afterwards becomes Lunatic, and the contract is not disputed, and is such as the Lord Chancellor intrusted as aforesaid thinks ought to be performed, or a specific performance of the contract, either wholly or so far as the same remains to be performed, has been decreed or ordered by the Court of Chancery, either before or after the Lunacy, the Committee of the Estate may, in the name and on behalf of the Lunatic, under an Order of the Lord Chancellor intrusted as aforesaid, on the application of the party claiming the benefit of the contract with the Lunatic, or any plaintiff in the suit, receive and give an effectual discharge for the money payable to the Lunatic, or so much thereof as remains unpaid, and make such conveyance of the land to such person and in such manner as the Lord Chancellor intrusted as aforesaid may order.

Lord Chancellor may dissolve and Committee may convey Partnership Property.

CXXIII. Where a person, being a member of a co-partnership firm, becomes Lunatic, the Lord Chancellor intrusted Partnership, as aforesaid may by Order made on the application of the partner or partners of the Lunatic, or of such other person or persons as the Lord Chancellor intrusted as aforesaid shall think entitled to require the same, dissolve the partnership; and thereupon, or upon a dissolution of the partnership by decree of the Court of Chancery, or otherwise by due course of law, the Committee of the Estate, in the name and on behalf of the Lunatic, may join and concur with such other person or persons in disposing of the partnership property, as well real as personal, to such persons, upon such terms, and in such manner, and may and shall execute and do such conveyances and things for effectuating this present provision, and apply the moneys payable to the Lunatic in respect of his share and interest in the co-partnership, in such manner as the Lord Chancellor intrusted as aforesaid shall order.

Committee may make sale, partition, or exchange.

CXXIV. Where a Lunatic is seised of or entitled to an undivided share of land, and it appears to the Lord Chancellor intrusted as aforesaid to be for his benefit and to be expedient that a sale of land, or part thereof, or a partition of the land, should be made, and where a Lunatic is seised of or entitled to land, and it appears to the Lord Chancellor intrusted as aforesaid to be for his benefit and to be expedient that an exchange thereof, or of part thereof, for other land, should be made, the Committee of the Estate, in the name and on behalf of the Lunatic, under an Order of the Lord Chancellor intrusted as aforesaid may concur with such other person in making such sale or partition, or may make such exchange, and receive such moneys payable on the sale, and give or receive such moneys for equality of partition or exchange, or otherwise in relation thereto, as the Order may direct: and all moneys received by the Committee of the Estate upon any such sale, partition, or exchange as aforesaid shall be applied and disposed of in manner directed in section One hundred and thirty-five of this Act respecting the fines, premiums, and sums of money therein mentioned; and the land taken in exchange shall be held and assured (as nearly as may be) to the same uses, and upon the same trusts, and subject to the same powers and provisions (if any), to, upon, and subject to which the land given in exchange was held; and the Committee of the Estate may and shall, in the name and on behalf of the Lunatic, execute and do all such conveyances and things for effectuating this present provision as the Lord Chancellor intrusted as aforesaid shall order.

CXXV. Where a Lunatic is seised of or entitled to land Committee in fee simple, and it appears to the Lord Chancellor intrusted may sell Land for as aforesaid to be for his benefit that the same or any part Building thereof should be made available for building purposes, and purposes. that to that end the same should, in lieu of being demised for long terms of years, be absolutely sold, he may order the same to be sold accordingly, to such persons, in such quantities, upon such terms, and in such manner as to him may seem expedient, and the moneys arising thereby shall be applied and disposed of in the manner directed in section One hundred and thirty-two of this Act respecting the surplus moneys therein mentioned; and the Committee of the Estate may and shall, in the name and on behalf of the Lunatic, execute and do all such conveyances and things for effectuating this present provision as the Lord Chancellor intrusted as aforesaid shall order.

CXXVI. Where a Lunatic has been engaged in trade or Committee business, and it appears to the Lord Chancellor intrusted as may assign aforesaid to be for the benefit of the Lunatic or his estate Premises.

that the business premises should be disposed of, the Committee of the Estate may, in the name and on behalf of the Lunatic, under order of the Lord Chancellor intrusted as aforesaid, make such conveyance of the messuages, buildings, or hereditaments of or belonging to the trade or business, or used in connection therewith, according to the Lunatic's estate and interest in the same, to such person, and shall apply the moneys arising thereby in such manner, as the Lord Chancellor intrusted as aforesaid shall order.

Committee ble Lease.

CXXVII. Where a Lunatic is entitled to a lease for a life may dispose or lives or for a term of years, either absolute or determinable on a death or otherwise, or to an under-lease, of whatsoever nature, and it appears to the Lord Chancellor intrusted as aforesaid to be desirable and for the benefit of the Lunatic or his estate that the lease or under-lease should be disposed of, the Committee of the Estate may, in the name and on behalf of the Lunatic, under Order of the Lord Chancellor intrusted as aforesaid, surrender, assign, or otherwise dispose of the lease or under-lease, to such person, for such valuable or nominal or other consideration, upon such terms, by such conveyances, and in such manner, and shall apply the moneys (if any) arising thereby in such manner, as the Lord Chancellor intrusted as aforesaid shall order.

Committee may make Agreements c. 10.

CXXVIII. The Committee of the Estate of a Lunatic may, with the approbation of the Lord Chancellor intrusted as under 1 G. 1, aforesaid, signified by Order on the application of the Committee, enter into an agreement for or on behalf of the Lunatic which the guardian of an infant might have entered into for or on behalf of the infant by virtue of the Act passed in the session of Parliament holden in the first year of the reign of King George the First, chapter ten, if so much of that Act as related to agreements of guardians for or on behalf of infants or idiots under their guardianship had not been repealed by the Act passed in the session of Parliament holden in the first year of the reign of King William the Fourth, chapter sixty-five, section twenty-five. (Vide Schedule hereto.)

> 1 "And be it further enacted that the Agreements of Guardians for and on behalf of Infants or Idiots under their Guardianship shall be as good and effectual to all intents and purposes, as if the said Infants or Idiots had been of full age, and of sound mind, and had themselves entered into such Agreements." 1 Geo. I. c. 10, sec. 9.

CXXIX. Where a Lunatic is seised or possessed of or Committee entitled to land in fee or in tail, or to leasehold land for an may make Building absolute interest, and it appears to the Lord Chancellor and other intrusted as aforesaid to be for his benefit that a lease or ject to such under-lease should be made thereof for terms of years, for Covenants encouraging the erection of buildings thereon, or for repair- Chancellor ing buildings actually being thereon, or otherwise improving shall order. the same, or for farming or other purposes, the Committee of the Estate may, in the name and on behalf of the Lunatic, under Order of the Lord Chancellor intrusted as aforesaid, make such lease of the land or any part thereof, according to the Lunatic's estate and interest therein, and to the nature of the tenure thereof, for such term or terms of years and subject to such rents and covenants as the Lord Chancellor intrusted as aforesaid shall order.1

CXXX. Where a Lunatic is seised or possessed of or Committee entitled to land in fee or in tail, and it appears to the Lord may make Chancellor intrusted as aforesaid to be for his benefit that Mines any mine or quarry already opened in, upon, or under the already opened. land should be worked, the Committee of the Estate may, in the name and on behalf of the Lunatic, under Order of the Lord Chancellor intrusted as aforesaid, make such lease of the mines, quarries, minerals, stones, and substances, in, upon, or under the land, either with or without any land convenient to be held therewith, and with or without the surface, to such person, for such term or terms of years, and subject to such rents, royalties, reservations, covenants, and agreements, and in such manner and form, as the Lord Chancellor intrusted as aforesaid shall order.1

CXXXI. Where a Lunatic is seised or possessed of or Committee entitled to land in fee or in tail, and it appears to the Lord may, where Chancellor intrusted as aforesaid either to be necessary for for mainthe maintenance of the Lunatic and the members of his tenance of Lunatic or immediate family for whom provision is directed to be made, expedient, or to be expedient in a due course of management, that any of Mines mine or quarry, being in, upon, or under the land, should be unopened. opened and worked, the Committee of the Estate may, in the name and on behalf of the Lunatic, under Order of the Lord Chancellor intrusted as aforesaid, make such lease of the mines, quarries, minerals, stones, and substances in, upon, or under the land, although not already opened or

necessary

¹ Vide 18 Vict. c. 13, post.

worked, and either with or without any land convenient to be held therewith, and with or without the surface, to such person, for such term or terms of years, and subject to such rents, royalties, reservations, covenants, and agreements, and in such manner and form as the Lord Chancellor intrusted as aforesaid shall order.

Produce of newlyopened Mines, where necessary for Lutenance, to be so apwise to be carried to separate account, and be considered Real Estate.

CXXXII. Where the Lord Chancellor intrusted as aforesaid makes any such Order as in and by the last preceding section is authorized to be made, by reason of its appearing to him to be necessary for the maintenance of the Lunatic natic's main- and such members of his immediate family as aforesaid, that the mine or quarry should be opened and worked, then the plied; other- moneys arising thereby shall be applied in or towards such maintenance as aforesaid, in such manner as the Lord Chancellor intrusted as aforesaid shall direct; but in such case the surplus thereof, and in every other case all the moneys so arising, shall be carried to a separate account, and may be applied for or towards all or any of the purposes for which moneys are hereinbefore authorized to be raised by sale of the Lunatic's estate, or in such other manner for the Lunatic's benefit as the Lord Chancellor intrusted as aforesaid shall direct; and upon the Lunatic's death the moneys remaining on the credit of such separate account shall, as between the representatives of his real and of his personal estate, be considered as real estate.

Committee may execute leasing powers of Lunatic having limited Estate.

CXXXIII. Where a Lunatic has a limited estate only in land, and any power whatsoever of leasing the same is vested in him, the Committee of his Estate may and shall from time to time, in the name and on behalf of the Lunatic, under Order of the Lord Chancellor intrusted as aforesaid, execute the power, to such extent and in such manner as the Order shall direct; and all fines, premiums, and sums of money (if any) received for or upon the granting of any lease under this present provision shall be applied and disposed of in manner directed in section One hundred and thirty-five of this Act respecting the fines, premiums, and sums of money therein mentioned.

Committee may accept Surrender, and make new Lease.

CXXXIV. Where a Lunatic is entitled or has a right to renew, and either it would be for his benefit to renew, or he might, in pursuance of any covenant or agreement, if not under disability, be compelled to renew, a lease made for a life, or lives, or for a term of years, either absolute or deter-

minable on a death or otherwise, the Committee of his Estate may, in his name, under an Order of the Lord Chancellor intrusted as aforesaid, upon the application of the Committee, or of any person entitled to the renewal, accept a surrender of the lease, and make and execute a new lease, of the premises comprised in the lease surrendered, for such number of lives, or for such term or terms of years determinable upon such number of lives, or for such term or terms of years absolute, as was or were mentioned or contained in the lease surrendered at the making thereof, or otherwise, as the Lord Chancellor intrusted as aforesaid shall order, but so that no renewed lease be executed by virtue of this Act, in pursuance of any covenant or agreement, unless the fine (if any) or such other sum of money (if any) as ought to be paid on renewal, and such things (if any) as ought to be performed in pursuance of the covenant or agreement by the lessee or tenant, be first paid and performed, and a counterpart be duly executed by the lessee.

CXXXV. All fines, premiums, and sums of money received Fines, how upon renewal shall, after deduction of all necessary incidental to be paid. charges and expenses, be paid to the Committee of the Estate, and be applied for the Lunatic's benefit as the Lord Chancellor intrusted as aforesaid shall order; but upon the Lunatic's death all such moneys as have arisen by such fines, premiums, On death or sums of money, or so much thereof as then remains un- of Lunatic, quality of applied, for his benefit, shall, as between the representatives Money arisof his real and of his personal estate, be considered as real Fines. estate, unless the Lunatic be tenant for life only, and then the same shall be considered as personal estate.

CXXXVI. Where a power is vested in a Lunatic for his Committee own benefit, or the consent of a Lunatic is necessary to the may exerexercise of a power, and such power of consent is in the vested in nature of a beneficial interest in the Lunatic, and it appears his own bento the Lord Chancellor intrusted as aforesaid to be for the efit, or give Lunatic's benefit, and also to be expedient, that the power should be exercised or the consent given (as the case may be), the Committee of the Estate may, in the name and on behalf of the Lunatic, under an Order of the Lord Chancellor intrusted as aforesaid, made upon the application of the Committee of the Estate, exercise the power or give the consent, as the case may be, in such manner as the Order shall direct.

Committee may exercise power vested in Lunatic in character of Trustee or Guardian, &c.

CXXXVII. Where a power is vested in a Lunatic in the character of trustee or guardian, or the consent of a Lunatic to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of the power, and it appears to the Lord Chancellor intrusted as aforesaid to be fit and expedient that the power should be exercised or the consent given (as the case may be), the Committee of the Estate in the name and on behalf of the Lunatic, under an Order of the Lord Chancellor intrusted as aforesaid, made upon the application of any person interested in the exercise of the power, may exercise the power or give the consent, as the case may be, in such manner as the Order shall direct.

Appointment of new trustees unhave effect of appointments by Court of Chancery, and like Orders may be made as under Trustee Act, 1850.

CXXXVIII. Where under this Act the Committee of the Estate, under Order of the Lord Chancellor intrusted as der power to aforesaid, exercises, in the name and on behalf of the Lunatic, a power of appointing new trustees vested in the Lunatic, the person or persons who shall, after and in consequence of the exercise of the power, be the trustee or trustees, shall have all the same rights and powers as he or they would have had if the Order had also been made by the Court of Chancery, under the Trustee Act, 1850, or any Act amending the same, or if he or they had been appointed by decree of that Court in a suit duly instituted; and the Lord Chancellor intrusted as aforesaid may in any such case, where it seems to him to be for the Lunatic's benefit, and also expedient, make any and every such Order respecting the land or stock or choses in action subject to the trust as might have been made in the same case under the provisions of the Trustee Act, 1850, or any Act amending the same, on the appointment thereunder of a new trustee or new trustees.

Deeds, &c., executed under this been of sound mind.

CXXXIX. Every surrender, lease, agreement, deed, conveyance, mortgage, or other disposition granted, accepted, Act to be as made, or executed by virtue of this Act shall be as valid and Valid as it legal to all intents and purposes as if the person in whose name or place or on whose behalf the same was granted, accepted, made, or executed had been of sound mind, and had granted, accepted, made, or executed the same.1

Stock belonging to Lunatic may be ordered to be transferred.

CXL. Where any stock is standing in the name of or is vested in a Lunatic beneficially entitled thereto, or is standing in the name of or vested in a Committee of the Estate of a Lunatic, in trust for the Lunatic, or as part of his property,

¹ Vide 25 & 26 Vict. c. 86, sec. 17, post.

and the Committee dies intestate, or himself becomes Lunatic, or is out of the jurisdiction of or not amenable to the process of the Court of Chancery, or it is uncertain whether the Committee be living or dead, or he neglects or refuses to transfer the stock, and to receive and pay over the dividends thereof, to a new Committee, or as he directs, for the space of fourteen days next after a request in writing for that purpose made by a new Committee, then the Lord Chancellor intrusted as aforesaid may order some fit person to transfer the stock to or into the name of a new Committee, or into the name of the Accountant-General of the Court of Chancery, or otherwise, and also to receive and pay over the dividends thereof, or such sum or sums of money and in such manner as the Lord Chancellor intrusted as aforesaid may order.

CXLI. Where any stock, or any portion of the capital Stock in stock, or any share of any company or society, whether name of Lutransferable in books or otherwise, is standing in the name ing out of of or vested in a person residing out of England and Wales, and Wales the Lord Chancellor intrusted as aforesaid, upon proof to his may be ordered to be satisfaction that the person has been declared idiot, lunatic, transferred. or of unsound mind, and that his personal estate has been vested in a Curator or other person appointed for the management thereof, according to the laws of the place where he is residing, may order some fit person to make such transfer of the stock, or such portion of the capital stock or share as aforesaid, or any part or parts thereof respectively, to or into the name of the Curator or other person appointed as aforesaid, or otherwise, and also to receive and pay over the dividends thereof, as the Lord Chancellor intrusted as aforesaid may think fit.

CXLII. Where an Order is made under this Act for the Who shall transfer of stock, the person to be named in the Order for be appointed to make making the transfer shall be some proper officer of the com- transfer. pany or society in whose books the transfer is to be made; and where the transfer is to be made in books kept by the Governor and Company of the Bank of England, the officer to be named shall be the Secretary or Deputy Secretary, or Accountant General or Deputy Accountant General for the time being, of the said Governor and Company.

CXLIII. All transfers and payments made in pursuance Transfers, of this Act shall be valid and binding to all intents and upon &c., to be binding. all persons whomsoever.

Indemnity to Bank of England,

CXLIV. This Act shall be a full indemnity and discharge to the Governor and Company of the Bank of England, their officers and servants, and all other persons respectively, for all acts and things done or permitted to be done pursuant thereto, which acts and things respectively shall not be questioned or impeached in any Court of Law or Equity to their detriment.1

Costs may be paid out of estate.

CXLV. The Lord Chancellor intrusted as aforesaid may order the costs and expenses of and relating to the petitions, applications, orders, directions, conveyances, and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the land or stock, or the rents or dividends in respect of which the same respectively shall be made, in such manner as he may think proper.2

Act not to

CXLVI. Nothing in this Act contained shall extend to subject Lu-natic's prop-subject any part of a Lunatic's property to the debts or deertyto debts. mands of his creditors, further or otherwise than as the same is now subject thereto by due course of law.

Powers to extend to Colonies, &c.

CXLVII. The powers and authorities given by this Act to the Lord Chancellor intrusted as aforesaid shall extend to all land and stock within any of the dominions, plantations, and colonies of Her Majesty (except Scotland and Ireland).

Traverse.

And with respect to the traverse of an Inquisition, be it further enacted as follows:

Petitions for Traverse to be presented ited time.

CXLVIII. Any person desiring to traverse may, within the three months next after the day of the return of the Inquisiwithin a lim-tion, present a Petition for that purpose to the Lord Chancellor intrusted as aforesaid, who is hereby required to hear and determine the Petition, and shall, in his Order upon it for a traverse, limit a time, not exceeding six months from the date of the Order, within which the person desiring to traverse and all other proper parties are to proceed to trial of the traverse. and who may by the same or any other Order direct that the person desiring to traverse, not being the person the object of the Inquisition, shall, within the three weeks next after the date of the Order, give sufficient security to and to the satisfaction of the Masters for all proper parties proceeding to trial within the time to be limited as aforesaid.8

¹ Vide 25 & 26 Vict. c. 86, secs. 17, 29, post.

² Vide same Act, secs. 11, 16, post.

⁸ Vide same Act, sec. 7.

CXLIX. Every person having right to traverse who shall Persons not within the time hereinbefore limited present his Petition not petition-ing or not for that purpose, or who shall refuse or neglect to give such proceeding security as aforesaid, or who shall not proceed to trial within within limthe time to be limited as aforesaid, and his heirs, executors, ited time, and administrators, and all others claiming by, through, or under him, shall be absolutely barred of his and their right of traverse, unless the Lord Chancellor intrusted as aforesaid shall, under the special circumstances of any particular case, think fit upon Petition for that purpose, to allow the traverse to be had or tried after the time by this Act limited, in all which special cases the Lord Chancellor intrusted as aforesaid may make such Orders as to him shall seem just.

CL. If the Lord Chancellor intrusted as aforesaid be dis-Lord Chansatisfied with the verdict returned upon a traverse, he may direct new order one or more new trial or trials thereon, as to him shall trials. No seem meet, and is usual in cases of issues directed by the traverse Court of Chancery; but no person shall be admitted to oftener traverse oftener than once.1

than once.

CLI. The Lord Chancellor intrusted as aforesaid and the Lord Chan-Masters may from time to time, after the return of the Inqui-cellor may sition, and notwithstanding a Petition or Order depending standing relative to a traverse thereof, make such Orders and do such make acts relative to the custody and commitment of the person, Orders for Manageand the commitment, management, and application of the ment of estates and effects of the person, the object of the Inquisi-person and tion, as he or they shall think necessary or proper (inclusive of the imposition and levying of fees and per-centage as hereinbefore provided); and all things done by any person . appointed Committee of the Person or Estate, or by any other person, shall be as valid and effectual, and all Committees, and other persons respectively, and their respective heirs, executors, and administrators, are hereby indemnified in respect of all such things as aforesaid from and against all actions, suits, and proceedings, damages, costs, charges, and expenses, to be brought, commenced, had, or recovered by the person the object of the Inquisition, his heirs, executors, or administrators, or any other person whomsoever, as fully and effectually as if the Inquisition had not been traversable, but not further or otherwise.1

And with respect to the Supersedeas of an Inquisition, be Superseit further enacted as follows:

1 Vide 25 & 26 Vict. c. 86, sec. 7.

Inquisition may be superseded upon terms.

CLII. Where any person has been found of unsound mind by Inquisition, but the question of unsoundness of mind is disputed, and liberty to traverse has been applied for, and whether granted or not, and it appears to the Lord Chancellor intrusted as aforesaid to be for the Lunatic's benefit and also to be expedient that the Inquisition should be superseded on terms and conditions, and subject to an arrangement respecting the Lunatic's estate, he may, upon the consent of the Lunatic and of the person entitled or claiming to traverse, and of such other persons, if any, whose consent he may deem necessary, order the Inquisition to be superseded on such terms and conditions to be fulfilled by the Lunatic or such other person, and subject to such arrangement respecting the Lunatic's estate, as he may under the circumstances of the case think proper, and may by the same or any other Order direct the Lunatic and any other persons, being consenting parties to the arrangement, to execute, make, and do, before or after the issuing of the Writ of Supersedeas, and he and they shall accordingly execute, make, and do, all such conveyances, transfers, and things as may to the Lord Chancellor intrusted as aforesaid seem necessary or proper for or for securing the fulfilment of such terms and conditions and the completion of such arrangement as aforesaid, and generally may make such Orders as to him may seem proper for effectuating this present provision; and all conveyances, transfers, and things, executed, made, and done under any such Order of the Lord Chancellor intrusted as aforesaid, either before or after the issuing of the Writ of Supersedeas, shall be as valid and binding to all intents and upon all persons whomsoever as if the Lunatic had not been found or had not been of unsound mind, but not further or otherwise.1

General Orders.

And be it declared and further enacted as follows: ---

Power to Lord Chancellor to make General Orders. CLIII. The Lord Chancellor, with the advice and assistance aforesaid, may from time to time make such Orders as to him shall seem meet for carrying into effect the purposes of this Act, and for regulating the form and mode of proceeding before and by the Masters and the practice in matters in Lunacy, and for regulating the duties of the several officers in Lunacy, and, so far as to him may seem expedient, for altering the course of proceeding hereinbefore prescribed in respect of the matters to which this Act relates, or any of them; and

¹ Vide 25 & 28 Vict. c. 86, sec. 10.

any such Order as aforesaid may be from time to time rescinded or varied by the like authority; and every such Order as aforesaid which shall alter the course of proceeding herein-before prescribed in respect of the matters to which this Act relates, or any of them, shall be laid before both Houses of Parliament within fourteen days after the making thereof, if Parliament be then assembled, and if not then within fourteen days after the meeting of Parliament then next following; and if either House of Parliament shall, by Resolution passed within thirty-six days next after any such Order as aforesaid has been laid before it, resolve that the whole or any part thereof ought not to continue in force, in that case the whole Order or the part of the Order specified in the Resolution (as the case may be) shall from and after the passing of the Resolution cease to be binding.¹

THE SCHEDULES ABOVE REFERRED TO.

SCHEDULE I. — (Vide Section I.)

THE ACTS REPEALED BY THIS ACT, WHOLLY OR IN PART.

Date of Act.	Title of Act.	Extent of Repeal.
6 Geo. IV., c. 53. [22d June, 1825.]	An Act for limiting the time within which Inquisitions of Lunacy, Idiotcy, and Non Compos Mentis may be traversed, and for making other Regulations in the Proceedings pending a Traverse.	so far as it relates to Ireland.
1 Wm. IV., c. 65. [23d July, 1830.]	An Act for consolidating and amending the Laws relating to Property belonging to Infants, Femes Covert, Idiots, Lunatics, and Persons of Unsound Mind.	relates to or affects Idiots, Lunatics, and
8 & 4 W. IV., c. 36. [24th July, 1838.]	An Act for diminishing the inconvenience and expense of Commissions in the nature of Writs de Lunatico Inquirando, and to provide for the better care and treatment of Idiots, Lunatics, and Persons of Unsound Mind, found such by Inquisition.	The whole Act.

¹ Vide 25 & 26 Vict c. 86, sec. 17, post.

SCHEDULE I. — continued.

Date of Act.	Title of Act.	Extent of Repeal.
3 & 4 W. IV., c. 84. [28th Aug., 1833.]	An Act to provide for the perform- ance of the duties of certain offices connected with the Court of Chan- cery which have been abolished.	So much of the Act as relates to the office or place of "The Secre- tary of Lunatics."
5 & 6 Vict., c. 84. [5th Aug., 1842.]	An Act to alter and amend the practice and course of proceeding under Commissions in the nature of Writs de Lunatico Inquirendo.	Sections 10, 12, and
15 & 16 Vict., c. 48 [30th June, 1852.]	An Act for the Amendment of the Law respecting the Property of Lunatics.	1
15 & 16 Vict., c. 87. [1st July, 1852.]	An Act for the Relief of the Suitors of the High Court of Chancery.	Sections 14, 30, 31, 32, and 33, all of which are in substance reenacted by this Act.

SCHEDULE II. — (Vide Section VI.)

THE OATH OF THE MASTERS.

I, do swear, That I will faithfully, impartially, and honestly, according to the best of my skill and knowledge, execute the several powers and trusts given to and reposed in me as one of the Masters in Lunacy, and that without favour or affection, prejudice or malice.

So help me GOD.

SCHEDULE III. — (Vide Section LIX.)

SHORT FORM OF AFFIDAVIT.

In the matter of A. B., a person of unsound mind.

I, C. D., the Petitioner named in the above-written [or annexed, as the case may be] Petition [or the person bringing in the above-written (or annexed) state of facts, &c.], make oath and say, That so much of the above-written Petition, &c. [as before], as relates to my own acts and deeds is true, and so much thereof as relates to the acts and deeds of any and every other person I believe to be true.

Sworn, &c.

LUNACY REGULATION AMENDMENT ACT, 1855.

18 VICT., CAP. XIII.

An Act to explain and amend the Lunacy Regulation Act, 1853.

[26th April, 1855.]

WHEREAS by the Section numbered CXXIX. of an Act passed in the Sixteenth and Seventeenth Years of the Reign of Her present Majesty, intituled An Act for the Regulation of Proceedings under Commissions of Lunacy, and the Consolidation and Amendment of the Acts respecting Lunatics so found by Inquisition, and their Estates, it was enacted, that where a Lunatic is seised or possessed of or entitled to land, in fee or in tail, or to leasehold land for an absolute interest, and it appears to the Lord Chancellor, intrusted as in the said Act mentioned, to be for his benefit that a lease or under-lease should be made thereof for terms of years, for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or otherwise improving the same, or for farming or other purposes, the Committee of the Estate may, in the name and on behalf of the Lunatic, under Order of the Lord Chancellor, intrusted as aforesaid, make such leases of the land or any part thereof, according to the Lunatic's estate and interest therein, and to the nature of the tenure thereof, for such term or terms of years, and subject to such rents and covenants, as the Lord Chancellor, intrusted as aforesaid, shall order: And whereas it has been considered that the Lord Chancellor, intrusted as aforesaid, cannot by force of the said enactment empower the Committee of a Lunatic tenant in tail to grant leases as extensively as was intended by the said enactment, which will bind his issue in tail and the remaindermen: And whereas it is expedient to explain and enlarge the power of the Lord Chancellor, intrusted as aforesaid, in the matter aforesaid: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Lord Chancellor, in Matters of Lunacy, enabled to empower Committees of Estates to grant Leases binding on Isues or Remaindermen.

I. Where a Lunatic is seised of or entitled to land in tail, and it appears to the Lord Chancellor, intrusted as aforesaid, to be for his benefit, the Committee of the Estate may in the name and on behalf of the Lunatic, under Order of the Lord Chancellor, intrusted as aforesaid, make any such leases of the land or any part thereof as in the said section of the said Act are mentioned, and every such lease shall be good and effectual in law against the Lunatic and his heirs, and all persons claiming the lands entailed by force of any estate tail which shall be vested in such Lunatic, and also against all persons, including the Queen's most Excellent Majesty, her heirs and successors, whose estates are to take effect after the determination of or in remainder or reversion expectant upon such estate tail, according to such estate as is comprised and specified in every such lease, in like manner as the same would have been good and effectual in law if the Lunatic at the time of the making of such lease had been lawfully seised of the same lands comprised in such lease of a pure estate in fee simple to his own use, and had been of sound mind, and not the subject of a Commission of Lunacy, and had himself granted such lease; and every person to whom from time to time the reversion expectant upon the lease shall belong after the death of the Lunatic shall and may have such and the like remedies and advantages to all intents and purposes, against the lessee, his executors, administrators, and assigns, as the Lunatic or his Committee would or might have had against him or them: And the powers given by Sections numbered CXXX. and CXXXI. of the said recited Act shall and are to operate as extensively as the power given by the said Section CXXIX. of the said Act as explained and enlarged by this Act.

Interpretation. II. Where any of the expressions in this Act are used in the said recited Act they shall receive the same interpretation in this Act as by the said recited Act is imposed upon them.

REGULATION OF LUNATICS' TREAMENT ACT, 1845.1

8 & 9 VICT., CAP. C.

(Vide Lun. Reg. Act, 1853, Sec. 53, ante.)

An Act for the Regulation of the Care and Treatment of Lunatics.

[4th August, 1845.]

Sec. 94. And be it enacted, That whenever the Commis-Commissioner shall have reason to suppose that the property of any sioners to person detained or taken charge of as a Lunatic is not duly property of protected, or that the income thereof is not duly applied for not duly his maintenance, such Commissioners shall make such in-protected or quiries relative thereto as they shall think proper, and report thereon to the Lord Chancellor.

Sec. 95. And be it enacted, That when any person shall The Lord have been received or taken charge of as a Lunatic upon an to direct the order and certificates, or an order and certificate, in pur-Master in suance of the provisions of this Act, or of any Act hereinbefore repealed, and shall either have been detained as a the Lunacy Lunatic for the twelve months then last past, or shall have son detained been the subject of a Report by the Commissioners in pursuance of the provision lastly hereinbefore contained, it shall point guarbe lawful for the Lord Chancellor to direct that one of the said Masters in Lunacy shall, and thereupon one of the said estate, and Masters shall personally examine such person, and shall take application such evidence and call for such information as to such Master of his inshall seem necessary to satisfy him whether such person is a Lunatic, and shall report thereon to the Lord Chancellor, and such Report shall be filed with the Secretary of Lunatics; and it shall be lawful for the Lord Chancellor from time to time to make Orders for the appointment of a guardian, or otherwise for the protection, care, and management of the person of any person who shall by any such Report as last aforesaid be found to be a Lunatic, and such guardian shall have the same powers and authorities as a Committee of the person of a Lunatic found such by Inquisition now

Lunacy to report as to of any peras a Lunatic. and to apdians of his person and direct the

¹ Now cited as "The Lunacy Act, 1845." See 47 & 48 Vict. c. 64, post.

has, and also to make Orders for the appointment of a receiver, or otherwise for the protection, care, and management of the estate of such Lunatic, and such receiver shall have the same powers and authorities as a receiver of the estate of a Lunatic found such by Inquisition now has, and also to make Orders for the application of the income of such Lunatic, or a sufficient part thereof, for his maintenance and support, and in payment of the costs, charges, and expenses attending the protection, care, and management of the person and estate of such Lunatic, and also as to the investment or other application for the purpose of accumulation of the overplus, if any, of such income, for the use of such Lunatic, as to the Lord Chancellor shall from time to time in each case seem fit: provided always, that such protection, care, and management, shall continue only during such time as such Lunatic shall continue to be detained as a Lunatic upon an order and certificates or certificate as aforesaid, and for such further time, not exceeding six months, as the Lord Chancellor may fix; provided also, that it shall be lawful for the Lord Chancellor in any such case, either before or after directing such Inquiry by such Master as aforesaid, and whether such Master shall have made a Report as aforesaid or not, to direct a Commission in the nature of a Writ de Lunatico Inquirendo to issue, to inquire of the Lunacy of such person.

Masters in Lunacy to have all necessary powers of Inquiry, and to make Inquiries referred to them.

Sec. 96. And be it enacted, that such Masters shall have power, in the prosecution of all Inquiries and matters which may be referred to them as aforesaid, or otherwise under this Act, to summon persons before them, and to administer oaths, and take evidence, either vivâ voce or on affidavit, and to require the production of books, papers, accounts, and documents; and that the Lord Chancellor may by any Order (either general or particular) refer to the said Masters any Inquiries under the provisions of this Act relating to the person and estate of any Lunatic as to whom a Report shall be made by a Master as aforesaid, in like manner as Inquiries relating to the persons and estates of Lunatics found such by Inquisition are now referred to them.

Lord Chancellor to make Orders and regulations, and fix fees. Sec. 97. And be it enacted, that it shall be lawful for the Lord Chancellor from time to time to make such Orders as shall to him seem fit for regulating the form and mode of proceeding before the Lord Chancellor and before the said Masters, and of any other proceedings pursuant to the pro-

visions of this Act, for the due protection, care, and management of the persons and estates of Lunatics as to whom such Reports shall be made by the said Masters as aforesaid, and also for fixing, altering, and discontinuing the fees to be received and taken in respect of such proceedings, as to the Lord Chancellor shall from time to time seem fit: Provided nevertheless, that all fees to be so received and taken shall be paid into the Bank of England, and placed to the credit of the Accountant-General of the Court of Chancery, to the account intituled "The Suitors Fee Fund Account," in like manner as and together with the fees payable under the Act passed in the 5 and 6 years of Her present Majesty, intituled "An Act to alter and amend the Practice and Course of 5 & 6 Vict. Proceeding under Commissions in the Nature of Writs de c. 84. Lunatico Inquirendo," and be applied in like manner as such last-mentioned fees.

Sec. 98. And be it enacted, that the travelling and other Masters' expenses of the said Masters and their clerks shall be paid expenses, to them, by virtue of any Order or Orders of the Court of paid. Chancery, out of the said fund, intituled "The Suitors Fee Fund Account," in the same manner as their expenses under the said last-mentioned Act.

PROPERTY OF LUNATICS AMENDMENT ACT, 1852.

15 & 16 Vict., Cap. xlviii.

An Act for the Amendment of the Law respecting the Property of Lunatics.

[30th June, 1852.]

[Sections 1 to 3, inclusive, are repealed by the Lunacy Regulation Act, 1853; Sec. 1, except so far as the same relate to Ireland.]

IV. And whereas by an Act of Parliament passed in the 8 & 9 Vict. ninth year of the reign of Her present Majesty Queen Victoria, intituled An Act for the Regulation of the Care and Treatment of Lunatics, it was enacted, that when any person should have been received or taken charge of as a Lunatic

upon an Order and certificates, or an Order and certificate, in pursuance of the provisions of the said Act, or of any Act thereby repealed, and should either have been detained as a Lunatic for the twelve months then last past, or should have been the subject of a report by the Commissioners in pursuance of the provision therein contained, it should be lawful for the Lord Chancellor to direct that one of the Masters in Lunacy should, and thereupon one of the said Masters should, personally examine such person, and should take such evidence and call for such information as to such Master should seem necessary to satisfy him whether such person was a Lunatic, and should report thereon to the Lord Chancellor, and such report should be filed with the Secretary of Lunatics; and it should be lawful for the Lord Chancellor from time to time to make Orders for the appointment of a guardian, or otherwise for the protection, care, and management of the person of any person who should by any such report as last aforesaid be found to be a Lunatic, and such guardian should have the same powers and authorities as a Committee of the person of a Lunatic found such by Inquisition then had, and also to make Orders for the appointment of a receiver, or otherwise for the protection, care, and management of the estate of such Lunatic, and such receiver should have the same powers and authorities as a receiver of the estate of a Lunatic found such by Inquisition then had, and also to make orders for the application of the income of such Lunatic, or a sufficient part thereof for his maintenance and support, and in payment of the costs, charges, and expenses attending the protection, care, and management of the person and estate of such Lunatic, and also as to the investment or other application for the purper the accumulation of the overplus, if any, of such income, for the use of such Lunatic, as to the Lord Chancellor should it. time to time in each case seem fit: And whereas doubts ha arisen whether the last-mentioned Act extends to authorize receiver appointed as aforesaid to receive dividends on Government or Bank Stock or Annuities standing in the Lunatic's name, and it is expedient that these doubts should be removed: Be it therefore enacted as follows:

Power to receive dividends of stock in Lunatic's name.

Every Receiver of the Estate of such Lunatic as aforesaid, already appointed, or who may be hereafter appointed under the powers in the said last-recited Act, shall have full power to demand, and to receive and to give effectual receipts for, the dividends due or to become due of any stock belonging to the Lunatic.

V. This Act shall be and is hereby declared to be a full Indemnity and complete indemnity and discharge to the Governor and to Bank of England, Company of the Bank of England, and all other Companies &c. and Societies, and their officers and servants, for all acts and things done or permitted to be done pursuant thereto, and such acts and things shall not be questioned or impeached in any Court of Law or Equity to their prejudice or detriment.

VI. The person or persons for the time being intrusted as Receiver aforesaid may, by Order upon a Petition, direct the Receiver may, under Order, make to make such repairs and improvements of or upon the land repairs, of the Lunatic, or to make to the tenant executing the same leases, &c. such allowance in respect thereof by and out of the Lunatic's income, and also to make and execute such contracts, agreements, leases, or under-leases of or concerning the same, as may seem expedient for the preservation or increase of the income; and every act done according to such direction as aforesaid shall be valid and binding to all intents and upon all persons whomsoever.

VII. In the construction of those provisions of this Act Interprewhich refer to the secondly-mentioned Act, the words " land," tation of words. "stock," and "dividends" respectively shall be interpreted as is provided for the like words in the first-mentioned Act.

LUNACY REGULATION ACT, 1862.

25 & 26 Vict., Cap. LXXXVI.

An Act to amend the Law relating to Commissions of Lunacy and the Proceedings under the same, and to provide more effectually for the Visiting of Lunatics, and for other purposes.

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[7th August, 1862.]

WHEREAS it is expedient to amend the Law relating to Commissions of Lunacy and the proceedings under the same, and to provide more effectually for the visiting of persons found Lunatic by Inquisition, and to make the other provisions hereinaster contained with respect to certain officers in Lunacy, and otherwise: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent

of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short Title.

I. This Act may be cited as "The Lunacy Regulation Act, 1862."

Interpretation.

II. In this Act, unless there be something in the subject matter or context repugnant to the construction, the following terms shall have the meanings hereinafter assigned to them:

Act to be construed as part of Lunacy Regulation Act, 1853, c. 70.

The expression "the Lord Chancellor intrusted as aforesaid" and the several other expressions and words mentioned and referred to in the second Section of the Act passed in the session of Parliament holden in the sixteenth and seven-16 & 17 Vict. teenth years of the reign of Her present Majesty, chapter seventy, intituled An Act for the Regulation of Proceedings under Commissions of Lunacy, and the Consolidation and Amendment of the Acts respecting Lunatics so found by Inquisition, and their Estates, shall be read and construed according to the interpretations thereof contained in the said section:

> And generally the provisions of the said Act (except so far as the same are altered by or are inconsistent with this Act) shall extend and apply to the several cases and matters provided for by this Act, in the same way as if this Act had been incorporated with and had formed part of the said Act.

Nature and Limit of Inquiry under Commissions of Lunacy.

III. The Inquiry to be made under every Order for Inquiry or Commission of Lunacy or issue shall be confined to the question whether or not the Person who is the subject of the Inquiry is at the time of such Inquiry of unsound mind, and incapable of managing himself or his affairs, and no evidence as to anything done or said by such person, or as to his demeanour or state of mind at any time being more than two years before the time of the Inquiry, shall be receivable in proof of insanity on any such Inquiry, or on the trial of any Traverse of an Inquisition, unless the Judge or Master shall otherwise direct.

Inquiries before a jury to be made by means of an of the Supe-

IV. Wherever, under the said Act, the Lord Chancellor intrusted as aforesaid shall order an Inquiry before a jury, he may by his Order direct an issue to be tried in one of Her issue to one Majesty's Superior Courts of Common Law at Westminster, and the question in such issue shall be, whether the alleged

insane person is of unsound mind and incapable of managing rior Courts himself or his affairs; and the provisions of the said Act of Common with respect to Commissions of Lunacy, and Orders for Inquiry to be tried by a jury, and the trial thereof, and the constitution of the jury, shall apply to any issue to be directed as aforesaid, and the trial thereof, and subject thereto such issue and the trial thereof shall be regulated by the Act of the eighth and ninth years of the reign of Her present Majesty, chapter one hundred and nine, intituled An Act to amend the Law concerning Games and Wagers, and the verdict upon any such issue, finding the alleged insane person to be of unsound mind and incapable of managing himself or his affairs, shall have the same force to all intents and purposes as an Inquisition under a Commission of Lunacy, finding a person to be of unsound mind and incapable of managing himself or his affairs, returned into the Court of Chancery.

V. Where in any Act of Parliament, Order, Rule of Court, Reference or Instrument, Reference is made to a Commission of Lunacy, in other Acts to Inor the Inquisition thereon, the issue hereby authorized to be quisition to directed, and the verdict thereon, operating as an Inquisition, apply to verdict on shall be deemed to be intended by or comprehended in the issue. Reference.

VI. On the trial of every such issue as last aforesaid the Examinaalleged insane person shall, if he is within the jurisdiction, tion of alleged Lunabe examined before the taking of the evidence is commenced, tic on the and at the close of the proceedings, before the jury consult the Inquias to their verdict, unless the presiding judge shall otherwise sition. direct; and such examinations of the alleged insane person shall take place either in open Court or in private as such Judge shall direct.

VII. No person shall be entitled to a Traverse of any No Traverse Inquisition made under any such Order as aforesaid upon of an Inquithe oath of a jury; but it shall be lawful for the Lord Chan-by one of cellor intrusted as aforesaid, if he shall think fit, upon a Peti- the Judges of the Supetion being presented to him within three months next after rior Courts the trial of any such issue, to order that a new trial shall be jury to be had of such issue or a new Inquiry made as to the insanity granted but of such person, subject to such directions and upon such may be orconditions as to the Lord Chancellor intrusted as aforesaid dered by the may seem proper.

cellor.

Sections One hundred and forty-eight, One hundred and forty-nine, and One hundred and fifty of the said Act (which sections relate to Petitions and Orders for the Traverse of Inquisitions) shall not apply to any case coming within the last preceding Section of this Act.

Section One hundred and fifty-one of the said Act shall apply to all proceedings taken, Orders made, and things done, pending a new trial or new Inquiry or the Petition for the same, in the same manner as is provided by the said Section with respect to such matters pending a Traverse or the Petition for the same.

Demand of Inquiry by jury.

VIII. And with reference to Inquiries before the Master without a jury, and the right of the alleged Lunatic to demand an Inquiry by a jury, be it enacted, upon the hearing of any Petition for Inquiry it shall be lawful for the alleged Lunatic, by himself, his Counsel, or Solicitor, orally, or by Petition addressed to the Lord Chancellor intrusted as aforesaid to demand an Inquiry by a jury, and such demand shall have the same effect as if made by notice filed with the Registrar in accordance with the provisions of the said Act.

Demand of Inquiry by jury may be withdrawn. IX. Upon such hearing the alleged Lunatic may, by himself, his Counsel, or Solicitor, orally, or by Petition as aforesaid, withdraw any notice of demanding an Inquiry by a jury previously filed by him.

Commission may be superseded on conditions.

X. And with respect to the superseding of Commissions, be it enacted, that if it shall appear to the Lord Chancellor that it is not expedient or for the benefit of the Lunatic that the Commission should be unconditionally superseded, but that the same should be superseded on terms and conditions, he may, upon the consent of the Lunatic and such other persons, if any, whose consent he may deem necessary, order the Commission to be superseded upon such terms and conditions as he shall think proper; and all the provisions contained in "The Lunacy Regulation Act, 1853," in relation to the superseding of the Commission in cases where a Traverse has been applied for, and to the proceedings for the fulfilling of such terms and conditions, shall apply to all cases in which the Commission shall be superseded upon terms and conditions under the provisions herein contained.

Lord Chancellor may order costs.

XI. It shall be lawful for the Lord Chancellor intrusted as aforesaid to order the costs, charges, and expenses of and incidental to the presentation of any Petition for a Commis-

sion in the nature of a Writ de Lunatico Inquirendo, or for any Order of Inquiry under "The Lunacy Regulation Act, 1853," and of and incidental to the prosecution of any Inquiry, Inquisition, Issue, Traverse, or other proceeding consequent upon such Commission or Order, to be paid either by the party or parties who shall have presented such Petition, or by the party or parties opposing such Petition, or out of the estate of the alleged Lunatic, or partly in one way and partly in another, as the Lord Chancellor intrusted as aforesaid shall in each case think proper; and such Order shall have the same force and effect as Orders for the payment of money made by the High Court of Chancery in cases within its jurisdiction.

In order that the property of insane persons when the same As to propis of small amount may be applied for their benefit in a sum- erty of inmary and inexpensive manner, be it enacted as follows:—

sane persons when of **sm**all amount.

XII. Where by the Report of one of the Masters in Lunacy Power to or of the Commissioners in Lunacy, or by affidavit or other-cellor, where wise, it is established to the satisfaction of the Lord Chan-property of cellor intrusted as aforesaid that any person is of unsound not exceed mind and incapable of managing his affairs, and that his £1,000 in property does not exceed one thousand 1 pounds in value, or £50 per anthat the income thereof does not exceed fifty 2 pounds per num, to apply it for his annum, the Lord Chancellor intrusted as aforesaid may, benefit in a without directing any Inquiry under a Commission of Lu-manner nacy, make such Order as he may consider expedient for the without Inpurpose of rendering the property of such person, or the income thereof, available for his maintenance or benefit or for carrying on his trade or business: Provided nevertheless, that the alleged insane person shall have such personal notice of the application for such Order as aforesaid as the Lord Chancellor shall by General Order to be made as aftermentioned direct.

Lord Chan-Lunatic does

XIII. For the purpose of giving effect to any such Order Power to as is mentioned in the last preceding section the Lord Chan-sell land or other propcellor intrusted as aforesaid may order any land, stock, or erty of Luother property of such person as aforesaid to be sold, charged benefit. by way of mortgage, or otherwise disposed of, and a conveyance, transfer, charge, or other disposition thereof to be exe-

¹ Now, two thousand. Act 45 & 46 Vict. c. 82.

² Now, one hundred. Act 45 & 46 Vict. c. 82.

cuted or made by any person on his behalf, and may order the proceeds of any such sale, charge, or other disposition, or the dividends or income of such land, stock, or property, to be paid to any relative of such insane person, or to such other person as it may be considered proper to trust with the application thereof, to be by him applied in the maintenance or for the benefit of the insane person, or of him and his family, either at the discretion of such relative or person, or in such manner, and subject to such control, and with or without such security for the application thereof, as the Lord Chancellor intrusted as aforesaid may direct; and for the purpose above mentioned the Lord Chancellor intrusted as aforesaid shall have all the same powers with respect to the transfer, sale, and disposition of, and otherwise respecting, the real and personal property of such person as aforesaid as if he had been found Lunatic by Inquisition.

Power to make General Orders effect the objects of ceding section.

XIV. The Lord Chancellor may from time to time make such General Orders as he may think fit for regulating the to carry into procedure to be adopted and the duties to be performed by the Masters and Officers in Lunacy for obtaining such Rethe last pre- ports as aforesaid, and for carrying the objects of the last two preceding sections into effect, and for vesting in such Masters and Officers such powers as the Lord Chancellor may consider expedient for the purposes aforesaid.

Power to apply property of persons acquitted on the ground of insanity for their benefit.

XV. Where any person has, on the trial of any indictment, been acquitted on the ground of insanity, it shall be lawful for the Lord Chancellor intrusted as aforesaid, on being satisfied by affidavit or otherwise of the continued insanity of such person, and of his being still in confinement, to make any such Order with respect to the property of such person, and the application thereof for his maintenance or benefit, or that of his family, or for carrying on his trade or business, as is mentioned in the three last preceding sections of this Act.¹

Charging Orders.

And for the purpose of extending the powers over the property of Lunatics given by section One hundred and sixteen of the said Act, be it enacted as follows: —

Extending powers of charging Lunatic's

XVI. Where it appears to the Lord Chancellor intrusted as aforesaid to be for the Lunatic's benefit, he may by Order direct any estate or interest of the Lunatic in land or stock,

¹ This section is repealed by Act 47 & 48 Vict. c. 64, post.

either in possession, reversion, remainder, contingency, or property for expectancy, and either existing or which may exist at any his maintenfuture time, to stand and be charged with any monies ad- and costs. vanced or to be advanced, or due or to become due, to any person for or in respect of any of the purposes or matters mentioned in the said section, and either with or without interest on such monies; and he may also by Order direct any such estate and interest to be dealt with and disposed of in such manner as he shall consider expedient for any of the purposes aforesaid, or for securing any monies advanced or to be advanced for such purposes or any of them, and with or without interest for the same; and every charge and disposition directed or made by or in pursuance of any such Order shall be valid and effectual to all intents and purposes, and shall take effect accordingly, subject only to any prior charge to which the estate or interest affected thereby may at the date of such Order be subject.

XVII. Every conveyance, transfer, charge, or other dis- General. position made or executed by virtue of this Act, and every All deeds. payment made in pursuance of this Act, shall be valid to all transfers, intents, and binding upon all persons whomsoever; and this &c., made Act shall be a full indemnity and discharge to the Governor in pursuand Company of the Bank of England, their officers and Act to be servants, and all other persons respectively, for all acts and binding. Inthings done or permitted to be done in pursuance thereof, or demnity to of any Order of the Lord Chancellor intrusted as aforesaid England, made or purporting to be made under this Act; and such &c. acts and things respectively shall not be questioned or impeached in any Court of Law or Equity to their detriment.

XVIII. To give further and better effect to the fifty-fifth, Power to fifty-sixth, and sixtieth sections of the said Act, respecting Masters to summon the attendance of witnesses before the said Masters, the witnesses. Masters may in the matter of any Lunatic or alleged Lunatic compel by summons the attendance of any person to give evidence before them, whether such person has or has not previously given evidence by affidavit; and every person so summoned shall be bound to attend as required by the summons, and give evidence before the said Masters, in like manner as is provided by the sixtieth section of the said Act in the case of persons who have given evidence by affidavit.

And with respect to the visiting of Lunatics, be it enacted Visiting. as follows: —

Duties of Visitors.

XIX. It shall be the duty of the Visitors to visit persons of unsound mind within the meaning of this Act at such times and in such rotation and manner, and to make such inquiries and investigations as to their care and treatment and mental and bodily health, and the arrangements for their maintenance and comfort, and otherwise respecting them, as the Lord Chancellor shall by General Orders, or as the Lord Chancellor intrusted as aforesaid shall by Special Order in any particular case from time to time direct.

All Lunatics to be visited four

XX. Provided always, That from and after the first day of October next every Lunatic shall be personally visited and times a-year. seen by one of the said Visitors four 1 times at least in every year, and such visits shall be so regulated as that the interval between successive visits to any such Lunatic shall in no case exceed four 2 months: Provided always, that Lunatics who are resident in licensed houses, asylums, or registered hospitals shall not necessarily be visited by any of the said Visitors more than once in the year, unless the Lord Chancellor intrusted as aforesaid shall otherwise direct.

Visitors also to visit alleged Lunatics, and make a Rethe Lord Chancellor.

XXI. The Visitors shall also visit such persons alleged to be insane, and shall make such Inquiries and Reports in reference to them as the Lord Chancellor intrusted as aforeport, &c., to said may direct, and at the expiration of every six calendar months they shall report to the Lord Chancellor the number of visits which they shall have made, the number of patients they shall have seen, and the number of miles they shall have travelled during such months, and shall on the first day of January in each year make a return to the Lord Chancellor of all sums received by them for travelling expenses, or upon any other account; and a copy of such Reports, showing the number of visits made, the number of patients seen, and the number of miles travelled, and also a copy of such return of sums received for travelling expenses, or upon any other account, shall be laid before Parliament on or before the first day of February in each year, if Parliament be then sitting, and if not, within twenty-one days next after the commencement of the next session of Parliament.

XXII. Sections One hundred and four and One hundred Sections 104 and 105 of 16 & 17 Vict. and five of the said Act (which sections relate to the visiting 2.70, reof Lunatics) are hereby repealed. realed.

- 1 Now, twice. Act 45 & 46 Vict. c. 82.
- ² Now, eight. Act 45 & 46 Vict. c. 82.
- ³ This section is repealed by "the Statute Law Revision Act, 1875," 38 & 39 Vict. c. 66.

XXIII. The Lord Chancellor may, if he shall so think fit, Officers in on a Petition presented to him for that purpose, order annui- Lunacy. ties, not exceeding one-half of their respective salaries, to be Power to the paid to the present Medical Visitors or either of them, in case Lord Chancelor to they or either of them shall be desirous of retiring from the allow penoffices held by them, they having already attained the re-present spective ages of seventy-eight and eighty-one years, and hav- Visitors, if desirous of ing served as such Medical Visitors for twenty-eight and retiring. twenty years respectively.1

XXIV. The Medical Visitors to be hereafter appointed Visitors to and the Legal Visitor shall hold their offices during their hold office during good good behaviour, but may be removed therefrom by the Lord behaviour. Chancellor in case of misconduct or neglect in the discharge receive salaof their duties, or of their being disabled from performing ries, but not the same, and they shall receive salaries of fifteen hundred in their propounds each, and shall not be in any way engaged in the fessions. practice of their respective professions.

XXV. Such Clerks to the Visitors may from time to time Clerks to be appointed by the Lord Chancellor and at such salaries as the Visitors. the Lord Chancellor, with the approbation of the Commissioners of Her Majesty's Treasury, shall from time to time direct: [So much of section twenty-three of the said Act as refers to the Clerk of the Secretary to the said Visitors is hereby repealed.]²

XXVI. The Lord Chancellor may, if he shall so think fit, Superanorder to be paid to any Officer who has served for twenty nuation Allowances to years in any office or offices in Lunacy, and who shall be Officers in above sixty years of age, and shall be desirous of retiring, Lunacy. or who is disabled by permanent infirmity from the performance of his duties, such superannuation allowance, not exceeding two-thirds of the salary payable to such officer or person at the time of his resignation, as the Lord Chancellor, with the approbation of the Commissioners of Her Majesty's Treasury, may approve.

XXVII. All annuities and salaries ordered to be paid in Payment of pursuance of this Act shall be payable out of "The Suitors' salaries. Fee Account," mentioned in the said Act, and at the times and in the manner directed by the twenty-fifth section of the said Act.

¹ This section is repealed by "the Statute Law Revision Act, 1875," 88 & 30 Vict. c. 66.

² This clause [—] is also repealed by same Act.

Registrar to behaviour.

XXVIII. The Registrar in Lunacy shall hold his office noid omce during good behaviour, and may be removed therefrom by the Lord Chancellor in case of misconduct or neglect in the discharge of his duties or his being disabled from performing the same.

Orders.

And with respect to Orders in Lunacy, be it enacted as follows:

Office copies be acted countant-General and others.

XXIX. The Accountant-General and all other persons, of Orders to and the Governor and Company of the Bank of England, upon by Ac-shall act upon all office copies of Orders in Lunacy purporting to be signed by the Registrar in Lunacy, and sealed with the seal of his office, in the same manner as such persons are by section One hundred and one of the said Act required to act upon office copies of Reports confirmed by Fiat.

TRUSTEE ACT, 1850.

13 & 14 VICT., CAP. 60.

An Act to consolidate and amend the Laws relating to the Conveyance and Transfer of real and personal Property vested in Mortgagees and Trustees.

(Section.)

[5th August, 1850.]

Interpretation clause.

II. The words "Lord Chancellor" shall mean as well the Lord Chancellor of Great Britain as any Lord Keeper or Lords Commissioners of the Great Seal for the time being:

The word "Lunatic" shall mean any person who shall have been found to be a Lunatic upon a Commission of Inquiry in the nature of a Writ de Lunatico Inquirendo:

The expression "Person of Unsound Mind" shall mean any person, not an infant, who not having been found to be a Lunatic, shall be incapable from infirmity of mind to manage his own affairs:

The word "Mortgage" shall be applicable to every estate, interest, or property in lands or personal estate which would in a Court of Equity be deemed merely a security for money.

Lord Chancellor may convey estates of

III. And be it enacted, That when any Lunatic or person of unsound mind shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted by virtue of the Queen's Sign Lunatic Manual with the care of the persons and estates of Lunatics, trustees and mortgages. to make an Order that such lands be vested in such person or persons in such manner and for such estate as he shall direct; and the Order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate.

IV. And be it enacted, that when any Lunatic or person May convey of unsound mind shall be entitled to any contingent right in contingent any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an Order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Lord Chancellor shall direct; and the Order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right.

V. And be it enacted, that when any Lunatic or person of Lord Chanunsound mind shall be solely entitled to any stock, or to any cellor may chose in action upon any trust, or by way of mortgage, it stock of Lushall be lawful for the Lord Chancellor intrusted as aforesaid tees and to make an Order vesting in any person or persons the right mortgagees. to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof; and when any person or persons shall be entitled jointly with any Lunatic or person of unsound mind to any stock or chose in action upon any trust, or by way of mortgage, it shall be lawful for the said Lord Chancellor to make an Order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any other person or persons the said Lord Chancellor may appoint.

VI. And be it enacted, that when any Stock shall be Power to standing in the name of any deceased person whose personal transfer stock of derepresentative is a Lunatic or a person of unsound mind, or ceased perwhen any chose in action shall be vested in any Lunatic or person of unsound mind, as the personal representative of a deceased person, it shall be lawful for the Lord Chancellor

intrusted as aforesaid to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in any person or persons he may appoint.

Power to appoint a person to convey in certain cases.

XX. And be it enacted, That in every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this Act, be enabled to make an Order having the effect of a conveyance or assignment of any lands, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, should it be deemed more convenient, to make an Order appointing a person to convey or assign such lands, or release or dispose of such contingent right; and the conveyance or assignment, or release or disposition, of the person so appointed, shall, when in conformity with the terms of the Order by which he is appointed, have the same effect, in conveying or assigning the lands, or releasing or disposing of the contingent right, as an Order of the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, would in the particular case have had under the provisions of this Act; and in every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this Act, be enabled to make an Order vesting in any person or persons the right to transfer any stock transferable in the books of the Governor and Company of the Bank of England, or of any other Company or Society established or to be established, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, if it be deemed more convenient, to make an order directing the Secretary, Deputy-Secretary, or Accountant-General for the time being of the Governor and Company of the Bank of England, or any officer of such other Company or Society, at once to transfer or join in transferring the Stock to the person or persons to be named in the Order; and this Act shall be a full and complete indemnity and discharge to the Governor and Company of the Bank of England, and all other Companies or Societies, and their officers and servants for all acts done or permitted to be done pursuant thereto.

Effect of an Order

XXVI. And be it enacted, That where any Order shall have been made under any of the provisions of this Act vest-

ing the Right to any Stock in any person or persons ap-vesting the pointed by the Lord Chancellor, intrusted as aforesaid, or legal right to transfer the Court of Chancery, such legal right shall vest accordingly, Stock. and thereupon the person or persons so appointed are hereby authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such Stock into his or their own name or names or otherwise, or relating to the receipt of the dividends thereof to the extent and in conformity with the terms of such Order; and the Bank of England, and all Companies and Associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such Order as the said Bank of England, or such Companies, Associations, or persons, would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made; and after notice in writing of any such Order of the Lord Chancellor, intrusted as aforesaid, or of the Court of Chancery, concerning any Stock shall have been given, it shall not be lawful for the Bank of England, or any Company or Association whatever, or any person having received such Notice, to act upon the requisition of the person in whose place an appointment shall have been made in any matter whatever relating to the transfer of such Stock, or the payment of the dividends or produce thereof.

XXVII. And be it enacted, That where any Order shall Effect of have been made under the provisions of this Act, either by an Order vestinglegal the Lord Chancellor, intrusted as aforesaid, or by the Court right in a of Chancery, vesting the legal right to sue for or recover any chose in action. chose in action or any interest in respect thereof in any person or persons, such legal right shall vest accordingly, and thereupon it shall be lawful for the person or persons so appointed to carry on, commence, and prosecute, in his or their own name or names, any action, suit, or other proceeding at law or in equity for the recovery of such chose in action, in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such chose in action.

Effect of an Order vesting copyhold lands, or appointson to convey copyhold lands.

XXVIII. And be it enacted, That whensoever, under any of the provisions of this Act, an Order shall be made either by the Lord Chancellor, intrusted as aforesaid, or the Court ing any per. of Chancery, vesting any copyhold or customary lands in any person or persons, and such Order shall be made with the consent of the Lord or Lady of the Manor whereof such lands are holden, then the lands shall, without any surrender or admittance in respect thereof, vest accordingly; and whenever, under any of the provisions of this Act, an Order shall be made either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, appointing any person or persons to convey or assign any copyhold or customary lands, it shall be lawful for such person or persons to do all acts and execute all instruments for the purpose of completing the assurance of such lands; and all such acts and instruments so done and executed shall have the same effect, and every Lord and Lady of a Manor, and every other person, shall, subject to the customs of the manor, and the usual payments, be equally bound and compellable to make admittance to such lands, and to do all other acts for the purpose of completing the assurance thereof, as if the persons in whose place an appointment shall have been made, being free from any disability, had duly done and executed such acts and instruments.

Power to make directions how the right to transfer Stock to be exercised.

XXXI. And be it enacted, That it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, to make declarations and give directions concerning the manner in which the right to any Stock, or chose in action vested under the provisions of this Act shall be exercised; and thereupon the person or persons in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other Orders under this Act are enforced.

Who may apply.

XXXVII. And be it enacted, That an Order, under any of the hereinbefore contained provisions, for the appointment of a new trustee or trustees, or concerning any lands, Stock, or chose in action subject to a trust, may be made upon the application of any person beneficially interested in such lands, Stock, or chose in action, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof; and that an Order under any of the provisions hereinbefore contained concerning any lands, Stock, or chose in action subject to a mortgage may be made on the application

of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the moneys secured by such mortgage.

XL. And be it enacted, That any Person or Persons enti- Power to tled in manner aforesaid to apply for an Order from the said present peti-Court of Chancery, or from the Lord Chancellor, intrusted as first inaforesaid, may, should he so think fit, present a Petition in the first instance to the Court of Chancery, or to the Lord Chancellor, intrusted as aforesaid, for such Order as he may deem himself entitled to, and may give evidence by affidavit or otherwise in support of such Petition before the said Court, or the Lord Chancellor, intrusted as aforesaid, and may serve such Person or Persons with notice of such Petition as he may deem entitled to service thereof.

XLIV. And be it enacted, That whenever any Order shall Orders be made under this Act, either by the Lord Chancellor, in- made by the Court of trusted as aforesaid, or by the Court of Chancery, for the Chancery, purpose of conveying or assigning any lands, or for the pur- certain allepose of releasing or disposing of any contingent right, and gations, to such Order shall be founded on an allegation of the personal sive eviincapacity of a trustee or mortgagee, or on an allegation that dence of the matter cona trustee or the heir or devisee of a mortgage is out of the mined in jurisdiction of the Court of Chancery, or cannot be found, or such allethat it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then in any of such cases the fact that the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, has made an Order upon such an allegation, shall be conclusive evidence of the matter so alleged in any Court of Law or Equity upon any question as to the legal validity of the Order: Provided always, that nothing herein contained shall prevent the Court of Chancery directing a reconveyance or reassignment of any lands conveyed or assigned by any Order under this Act, or a redisposition of any contingent right conveyed or disposed of by such Order; and it shall be lawful for the said Court to direct any of the parties to any suit concerning such lands or contingent right to pay any costs occasioned by the Order under this Act, when the same shall appear to have been improperly obtained.

Money of infants and persons of unsound mind to be paid into Court.

XLVIII. And be it enacted, That where any infant or person of unsound mind shall be entitled to any money payable in discharge of any lands, stock, or chose in action conveyed, assigned, or transferred under this Act, it shall be lawful for the person by whom such money is payable to pay the same into the Bank of England in the name and with the privity of the Accountant General, in trust in any cause then depending concerning such money, or, if there shall be no such cause, to the credit of such infant or person of unsound mind, subject to the order or disposition of the said Court; and it shall be lawful for the said Court, upon petition in a summary way, to order any money so paid to be invested in the public funds, and to order payment or distribution thereof, or payment of the dividends thereof, as to the said Court shall seem reasonable; and every cashier of the Bank of England who shall receive any such money is hereby required to give to the person paying the same a receipt for such money, and such receipt shall be an effectual discharge for the money therein respectively expressed to have been received.

Costs may be paid out of the Estate.

LI. And be it enacted, That the Lord Chancellor, intrusted as aforesaid, and the Court of Chancery, may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments, and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Lord Chancellor or Court shall think proper.

Commission

LII. And be it enacted, That upon any petition being preconcerning person of un-sented under this Act, to the Lord Chancellor, intrusted as sound mind. aforesaid, concerning a person of unsound mind, it shall be lawful for the said Lord Chancellor, should he so think fit, to direct that a Commission in the nature of a Writ de Lunatico Inquirendo shall issue concerning such person, and to postpone making any Order upon such petition until a return shall have been made to such Commission.

TRUSTEE ACT, 1850. AMENDMENT.

15 & 16 VICTORIA, CAP. 55.

An Act to extend the Provisions of "The Trustee Act, 1850."

[30th June, 1852.]

Sec. XI. That all the jurisdiction conferred by this Act on Persons the Lord Chancellor, intrusted by virtue of the Queen's Sign intrusted with the Manual with the care of the persons and estates of Lunatics, care of shall and may be had, exercised, and performed by the person or persons for the time being intrusted as aforesaid.

Sec. XIII. That every Order to be made under the Trustee All Orders Act, 1850, or this Act, which shall have the effect of a con-Trustee Act, veyance or assignment of any lands, or a transfer of any such 1850, or this stock as can only be transferred by stamped deed, shall be chargeable. chargeable with the like amount of stamp duty as it would with the same stamp have been chargeable with if it had been a deed executed by duty as the person or persons seised or possessed of such lands, or reyance. entitled to such stock, and every such Order shall be duly stamped for denoting the payment of the said duty.

made under Act, to be deeds of con-

TRIAL OF LUNATICS ACT, 1883.

46 & 47 Vict., Cap. 38.1

2. — (1.) Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time the act was done or omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission

¹ The formal portions of the Act are here omitted.

charged against him, but was insane as aforesaid at the time when he did the act or made the omission.

(2.) Where such special verdict is found, the Court shall order the accused to be kept in custody as a criminal lunatic, in such place and in such manner as the Court shall direct till Her Majesty's pleasure shall be known; and it shall be lawful for Her Majesty thereupon, and from time to time, to give such order for the safe custody of the said person during pleasure, in such place and in such manner as to Her Majesty may seem fit.

CRIMINAL LUNATICS ACT, 1884.

47 & 48 VICT., CAP. 64.

[14th August, 1884.]

Order for detention of insane prisoner as criminal lunatic. Be it enacted, &c.1

- 2.— (1.) Where a prisoner is certified, in manner provided in this section, to be insane, a Secretary of State may if he thinks fit, by warrant direct such prisoner to be removed to the asylum named in the warrant, and thereupon such prisoner shall be removed to and received in such asylum, and, subject to the provisions of this Act relating to conditional discharge and otherwise, shall be detained therein, or in any other asylum to which he may be transferred in pursuance of this Act, as a criminal lunatic until he ceases to be a criminal lunatic.
- (2.) A person shall cease to be a criminal lunatic if he is remitted to prison or absolutely discharged in manner provided by this Act, or if any term of penal servitude or imprisonment to which he may be subject determines.
- (3.) Where it appears to any two members of the visiting committee of a prison that a prisoner in such prison, not being under sentence of death, is insane, they shall call to their assistance two legally qualified medical practitioners, and such members and practitioners shall examine such prisoner and inquire as to his insanity, and after such examination and inquiry may certify in writing that he is insane.
- (4.) In the case of a prisoner under sentence of death, if it appears to a Secretary of State, either by means of a

¹ The formal parts of the Act and the interpretation clause (sec. 16), and also part of sec. 7, and secs. 8 and 9, are here omitted.

certificate signed by two members of the visiting committee of the prison in which such prisoner is confined, or by any other means, that there is reason to believe such prisoner to be insane, the Secretary of State shall appoint two or more legally qualified medical practitioners, and the said medical practitioners shall forthwith examine such prisoner and inquire as to his insanity, and after such examination and inquiry such practitioners shall make a report in writing to the Secretary of State as to the sanity of the prisoner, and they, or the majority of them, may certify in writing that he is insane.

- (5.) The powers and duties by this section conferred and imposed on any two members of the visiting committee of a prison shall be exercised in the case of a prisoner in any prison within the jurisdiction of the Directors of Convict Prisons by the said directors or one of them, and in the case of a prisoner in any prison within the jurisdiction of the Prison Commissioners may also be exercised by the said commissioners or one of them, and in the case of a prisoner in any prison not within the jurisdiction of such directors or commissioners shall be exercised by two visitors of the prison, or by two justices of the county or place in which such prison is situate.
- 3. Where it is certified by two legally qualified medical Remitting practitioners that a person being a criminal lunatic (not being of criminal lunatic to a person with respect to whom a special verdict has been prison. returned that he was guilty of the act or omission charged against him, but was insane at the time when he committed the act or made the omission) is sane, a Secretary of State, if satisfied that it is proper so to do, may by warrant direct such person to be remitted to prison, to be dealt with according to law.

4. — (1.) The superintendent of an asylum or other place Periodical in which any criminal lunatic is detained shall make a report report or criminal luto a Secretary of State at such times (not being less than natics. once a year) and containing such particulars as the Secretary of State may require, of the condition and circumstances of every criminal lunatic in such asylum or place; and the Secretary of State shall, at least once in every three years during which a criminal lunatic is detained in any asylum or other place, take into consideration the condition, history, and circumstances of such lunatic, and determine whether he ought to be discharged or otherwise dealt with.

(2.) Where a criminal lunatic is conditionally discharged in pursuance of this Act, a report of his condition shall be

made to a Secretary of State by such person at such times and containing such particulars as may be required by the warrant of discharge.

Transfer and discharge (absolute or conditional) of criminal lunatic.

a. 9; 27 &

29, s. 2; 30

Vict. c. 12,

88. 4, 5.]

[See 23 & 24 Vict. c. 75, 28 Vict. c.

- 5.—(1.) A Secretary of State may from time to time by warrant direct the transfer to an asylum of any criminal lunatic detained in any other asylum or in any other place, and such criminal lunatic shall accordingly be received and detained in the asylum to which he is so transferred.
- (2.) A Secretary of State by warrant may absolutely discharge any criminal lunatic, and may also discharge any criminal lunatic conditionally, that is to say, on such conditions as to the duration of such discharge and otherwise as the Secretary of State may think fit.
- (3.) Where in pursuance of this section a criminal lunatic has been discharged conditionally, if any of the conditions of such discharge appear to a Secretary of State to be broken, or the conditional discharge is revoked, the Secretary of State may by warrant direct him to be taken into custody, and to be conveyed to some asylum named in the warrant; and he may thereupon be taken in like manner as if he had escaped from such asylum, and shall be received and detained therein as if he had been removed thereto in pursuance of the foregoing provisions of this Act.

Duty of superintendent on discharge or expiration of sentence.

6. Where a person, being a criminal lunatic, is detained in any asylum or place, and either he is absolutely discharged or the term of penal servitude or imprisonment to which he is subject determines, it shall be the duty of the superintendent of such asylum or place, unless satisfied that the said person is sane, to take all reasonable means for his being placed under the care of some relation or friend, or in some asylum or place for the reception of lunatics.

Person ceasing to be criminal lunatic and becoming pauper lu-

- 7.—(1.) Where a person being a criminal lunatic is detained in an asylum or other place, or being a prisoner in any prison is certified in manner provided by this Act to be insane, but has not been directed by the Secretary of State to be removed to an asylum, and it is made to appear to any justice of the peace having jurisdiction where such asylum or place or prison is situate, or being a member of the visiting committee of such prison, by notice in writing signed by the superintendent of such asylum or place, or by the governor of such prison, either —
 - (a.) that such person is about to be absolutely discharged, or
 - (b.) that any term of penal servitude or imprisonment to which such person is subject is about to determine,

and that in the opinion of such superintendent or governor such person is insane and unfit to be at large, the said justice shall examine such person and make any inquiry and take any medical or other evidence which he may deem necessary respecting him.

(2.) The said justice, if satisfied on such examination and inquiry that such person is insane and a proper person to be detained under care and treatment, shall make an order for his detention as a lunatic in the asylum or place of confinement for lunatics named in the order; and if within one month after the date of the said notice such criminal lunatic is absolutely discharged, or such term of penal servitude or imprisonment determines, the said order shall thereupon take effect, and he shall be deemed to be a pauper lunatic.1

10. — (1.) Subject as in this section mentioned, all ex- Provision as penses incurred under this Act in relation to a criminal to expenses lunatic while detained in an asylum, and all expenses of ance of removing a person on his becoming under this Act a pauper criminal lulunatic to an asylum or place of confinement for lunatics in any part of the United Kingdom, shall be defrayed out of moneys provided by Parliament, and the costs of maintenance of a criminal lunatic in any asylum within the meaning of the Lunatic Asylums Act, 1853, shall be at the same rate as if he 16 & 17 Vict. was a lunatic sent from a union or parish situate elsewhere c. 97. than in the county or borough to which the asylum belongs.

- (2.) Where a person, being a criminal lunatic, is absolutely discharged before the expiration of any term of penal servitude or imprisonment to which he is subject, or is conditionally discharged in pursuance of this Act, the Commissioners of Her Majesty's Treasury may from time to time contribute, out of moneys provided by Parliament, such sum or sums, on the recommendation of a Secretary of State, as they from time to time think fit towards the costs of the maintenance of such person, until the expiration of the said sentence, or so long as he continues to be subject to any conditions of discharge (as the case may be).
- (3.) Section one hundred and four of the Lunatic Asylums Act, 1853, with respect to the application of the property of a lunatic for his maintenance and for the other charges in the said section mentioned, and the other sections of the Lunatic Asylums Act, 1853, which are ancillary to the said section

¹ The omitted clauses of this section and sections 8 and 9 of the Act. also omitted, prescribe in detail the procedure under the portion of section 7, printed above.

one hundred and four, shall extend to a criminal lunatic wherever he may be detained, and to his property, in like manner as if the said sections were herein re-enacted and in terms made applicable thereto, and any power exercisable by justices under the said section may, for the purposes of this section, be exercised by two justices of the county or place where such lunatic is detained.

The Lord Chancellor, or other authority having power to make orders with respect to the property of a lunatic, under sections twelve, thirteen, and fourteen of the Lunacy Regulation Act, 1862, shall, if satisfied by affidavit or otherwise that a person is or has been a criminal lunatic, and continues to be insane and to be in confinement, have power to make any such order with respect to the property of such person, and the application thereof for the maintenance or benefit of him or his family, or for carrying on his trade or business, as may be made in pursuance of the said sections of the Lunacy Regulation Act, 1862.

25 & 26 Vict. c. 88.

c. 81.

(4.) When the criminal lunatic was a person removed from 14&15 Vict. India in pursuance of the Lunatics Removal (India) Act, 1851, all expenses attending the removal of any such person from India, and his safe custody and maintenance, shall continue to be defrayed in the same manner as if this Act had not been passed.

Recapture of escaped lunatic, and or aiding to escape.

- 11.—(1.) Sections eleven and twelve of the Criminal Lunatic Asylums Act, 1860, shall apply to every asylum or punishment place in which criminal lunatics are confined so far as regards for rescuing those lunatics, and to the criminal lunatics in such asylum or place, in all respects as if such asylum or place were an asylum for criminal lunatics appointed by Her Majesty in pursuance of that Act, and any officer, servant, or other person committing any such offence as is mentioned in the said section twelve shall be liable to be convicted and punished accordingly.
 - (2.) If a person escapes while being conveyed to an asylum or place in pursuance of this Act he may be re-taken at any time, in like manner as if he had escaped from the said asylum.

Treatment

12. A Secretary of State may from time to time make, and of imbeciles. when made revoke and vary, regulations for the treatment of persons sentenced to or ordered to be kept in penal servitude or imprisonment who appear, in accordance with the said regulations, to be from imbecility of mind either unfit for penal discipline or unfit for the same penal discipline as other prisoners.

- 13. Nothing in this Act shall restrain or affect the au-Saving of thority of Her Majesty, where She may so think fit, to make authority of Crown to any order with respect to any person for whose safe custody make orders. during Her pleasure Her Majesty is by law authorised to give order.
- 14. (1.) Subject as herein-after provided, this Act shall Provision as apply to any person who at the commencement of this Act is, to existing criminal luin pursuance of the Acts relating to criminal lunatics, de-natics. tained in an asylum or place of confinement for lunatics; provided that any such person detained in pursuance of section six of the Criminal Lunatics Act, 1867, shall on the 30 & 31 Vict. commencement of this Act be deemed to be a person who c. 12. has become under this Act a pauper lunatic.
- (2.) An order under this Act for the detention of any person as a pauper lunatic may be made before the commencement of this Act, but shall not take effect until such commencement.
- 15. A warrant of a Secretary of State under this Act may Making and be under the hand of a Secretary of State or of an Under execution of warrant of Secretary of State, and may be executed by the person to Secretary of whom it is addressed, or by any constable; and such warrant State. when it relates to a person not in custody may be executed in like manner as if it were a warrant for the arrest of a person charged with an offence, and it shall be the duty of every constable to aid in the execution of every warrant of a Secretary of State under this Act.

- 17. The Acts mentioned in the Second Schedule to this Repeal. Act are hereby repealed, as from the commencement of this Act, to the extent shown in the third column of the said schedule; but this repeal shall not affect any warrant issued, or order made, or thing done in pursuance of any enactment so repealed.
- 18. This Act shall, save as in this Act otherwise provided, Commencecome into operation on the first day of November, one thou-ment and extent of sand eight hundred and eighty-four, which day is in this Act Act. referred to as "the commencement of this Act."

Save as in this Act otherwise expressly provided, this Act shall not extend to Scotland or Ireland.

THE FIRST SCHEDULE.1

Section 1.

Session and Chapter.	Title.	Short Title.			
8 & 9 Vict. c. 100.	An Act for the regulation of the care and treatment of lunatics.	The Lunacy Act, 1845.			
8 & 9 Vict. c. 107.	An Act for the establishment of a central asylum for insane persons charged with offences in Ireland; and to amend the Act relating to the prevention of offences by insane persons, and the Acts respecting asylums for the insane poor, in Ireland; and for appropriating the lunatic asylum in the city of Cork to the purposes of a district lunatic asylum.	Lunatic Asylum (Ireland) Act, 1845.			
14 & 15 Vict. c. 81.	An Act to authorise the removal from India of insane persons charged with offences, and to give better effect to inquisitions of lunacy taken in India.	(India) Act, 1851.			
23 & 24 Vict. c. 75.	An Act to make better provision for the custody and care of criminal lunatics.	The Criminal Lunatic			
25 & 26 Vict. c. 54.	An Act to make further provision respecting lunacy in Scotland.	The Lunacy (Scotland) Act, 1862.			

¹ Acts referred to, which may be cited by the "short titles" given above.

THE SECOND SCHEDULE. Section 17.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
3 & 4 Vict. c. 54.	An Act for making further provision for the confinement and maintenance of insane prisoners.	The whole Act.
6 & 7 Vict. c. 28.	An Act for regulating the prison at Millbank.	Section twenty-one.
16 & 17 Vict. c. 96.	An Act to amend an Act passed in the ninth year of Her Majesty "for the regulation of the care and treatment of lunatics."	and including the
23 & 24 Vict. c. 75.	An Act to make better provision for the custody and care of criminal lunatics.	Section two, the words
25 & 26 Vict. c. 86. 27 & 28 Vict. c. 29.	The Lunacy Regulation Act, 1862. An Act to amend the Act third and fourth Victoria, chapter fifty-four, for making further provision for the confinement and maintenance or insert and price or insert and maintenance.	Section fifteen. The whole Act.
29 & 80 Vict. c. 109.	insane prisoners. The Naval Discipline Act, 1866.	Section eighty, so far as relates to a person imprisoned in England.
80 & 31 Vict. c. 12. 82 & 83 Vict. c. 78. 44 & 45 Vict. c. 58.	The Criminal Lunatics Act, 1867. The Criminal Lunatics Act, 1869. The Army Act, 1881.	The whole Act. The whole Act. In section one hundred and thirty so much of sub-section five as relates to a person im-
46 & 47 Vict. c. 38.	The Trial of Lunatics Act, 1883.	prisoned in England. Sub-section three of sec- tion two.

MARRIAGE ACT OF LUNATICS, 1742.

15 GEORGE II., CAP. XXX.

An Act to prevent the Marriage of Lunatics.

Whereas persons who have the misfortune to become Lunatics, may, by reason of such their disorder, be liable to be surprized into unsuitable marriages, which may be of pernicious consequence, and a great misfortune to their families: Wherefore, for preventing the same, and the ill consequence thereof, be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the twenty-fourth day of June, in the year of Our Lord One thousand seven hundred and forty-two, in case any person who now is, or at any time hereafter shall be found a Lunatic, by any Inquisition taken or to be taken by to marry till virtue of a Commission under the Great Seal of Great Britain, or any Lunatic or person under a phrensy, whose person and estate by virtue of any Act of Parliament, now are, or hereafter shall be committed to the care and custody of particular Trustees, shall marry before he or she shall be declared of sane mind by the Lord High Chancellor of Great Britain, the Lord Keeper or Lords Commissioners of the Great Seal of Great Britain for the time being, or such Trustees as aforesaid, or the major part of them respectively, every such marriage shall be, and is hereby declared to be null and void to all intents and purposes whatsoever.1

Lunatic not declared of sane mind by the Lord Chancellor, &c., &c.

> 1 This Act was said to have been obtained in consequence of the case of Mr. Newport, who had been left a large fortune. (Com. Dig. vol. 4. Tit. Idiot, D. 462.)

> By the Marriage Act, 4 Geo. IV. c. 76, sec. 17, it is provided that if the father of a minor be non compos mentis, or if the guardians or the mother of a minor be non compos mentis or beyond the seas, or shall unreasonably, &c., refuse or withhold their consent to a proper marriage, the parties may apply to the Lord Chancellor, &c., by Petition in a summary way for a declaration as to the propriety of the marriage, which in such case is to be as effectual as if the father, &c., had consented to it.

> Mr. Elmer (Practice in Lunacy, 332) says: " Although the above Act has been repealed by the Statute Law Revision Act, 36 & 37 Vict. c. 91 (1873), it remained unrepealed from the date of its passing in 1742 until 1873 (131 years), notwithstanding the so-called 'Irish Act' of

MARRIAGE ACT OF LUNATICS, 1811.

51 GEORGE III., CAP. XXXVII.

An Act further to prevent the Marriage of Lunatics.

[31st May, 1811.]

Whereas an Act was made in the Parliament of Great Persons Britain, in the Fifteenth Year of the reign of His late found Luna-Majesty King George the Second, to prevent the marriage before deof Lunatics: And whereas it is expedient that the provisions Marriage to of the said Act should be extended to Ireland; be it there-be void. fore enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Tem poral, and Commons, in this present Parliament assembled, and by the authority of the same, That, from and after the expiration of ten days after the passing of this Act, in case any person who has been, or at any time hereafter shall be found a Lunatic by any Inquisition taken or to be taken by virtue of a Commission under the Great Seal of Great Britain, or the Great Seal of Ireland respectively, or any Lunatic or person under a phrenzy, whose person and estate by virtue of any Act of Parliament now or hereafter shall be committed to the care and custody of particular Trustees, shall marry before he or she shall be declared of sane mind by the Lord High Chancellor of Great Britain or Ireland, or the Lord Keeper or Lords Commissioners of the Great Seal of Great Britain or Ireland for the time being, or such Trustees as aforesaid, or the major part of them respectively, as the nature of the case shall require, every such marriage shall be and is hereby declared to be null and void to all intents and purposes whatsoever.

51 Geo. III. c. 37 (given below), was made applicable to England (for which there were thus two Acts in force), as well as to Ireland. What reason there could be for this arrangement, seeing that the English Act was still in existence and in force, does not appear."

"This Act of 51 Geo. III. c. 87, is therefore now the law on this subject, and is not, as appears to have been supposed, confined to Ireland alone; but is the Act prohibiting the marriage of Lunatics both in England and Ireland."

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